

(22,364.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 743.

THE PEOPLE OF PORTO RICO, PLAINTIFFS IN ERROR,

vs.

THE TITLE GUARANTY AND SURETY COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.

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IN THE
Circuit Court of the United States,
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

October Term, 1906. No. 66.

THE PEOPLE OF PORTO RICO

v.

THE TITLE GUARANTY & SURETY COMPANY.

DOCKET ENTRIES.

Sept. 26, 1906,	Præcipe for Summons.
" " "	Summons issued.
" 28 "	Summons returned served.
Oct. 3 "	Præcipe for appearance of Willard, Warren & Knapp for Deft.
Dec. 13 "	Warrant of Attorney of Plaintiff's Attorney.
" " "	Statement filed.
Jan. 4, 1907	Demurrer.
Nov. 2, 1908	Petition and amended statement and Order of Court.
" " "	Demurrer to Plaintiff's amended dec- laration.
" " "	Demurrer is overruled with leave to plead to the action and to file an affidavit of defense within thirty days.
" " "	The defendants pray an exception which is allowed.

"	20	"	Affidavit of Defense.
"	"	"	Plea: "Non assumpsit."
Dec.	7	"	Rule for judgment for want of sufficient affidavit of defense.
Oct.	26,	1909	Jury called and sworn (see minutes).
Nov.	3	"	Trial.
"	"	"	Motion to dismiss action for lack of jurisdiction and Order of Court thereon overruling motion and exception noted.
"	4	"	Trial.
"	5	"	Trial.
"	6	"	Trial.
"	"	"	Motion for non-suit.
"	"	"	Non-suit granted.
"	"	"	Motion to strike off non-suit and Order of Court granting rule to show cause why non-suit should not be stricken off <i>ret. sec. reg.</i>
Dec.	29	"	Now, Dec. 29, 1909, this cause coming on to be heard on rule to show cause why the compulsory non-suit entered at the trial should not be taken off and a new trial awarded, and having been argued by counsel for the respective parties, upon due consideration thereof it is thereupon ordered and adjudged that the rule to show cause be and the same is hereby discharged, and judgment is directed to be entered in favor of the deft. for costs, to which refusal to take off said non-suit and the direction of judgment in favor of the defendant the plaintiff excepts. R. W. Archbald, Dist. Judge.

- " " " Judgment for costs entered against plaintiff.
 " 30 " Agreement of attorneys for plaintiff and defendant that the time for settling and filing the bill of exceptions may be extended to January 15th, 1910.
 " " " Order of Court thereon extending time to Jan'y 15th, 1910.
 " 31 " Præcipe of E. N. Willard, Esq., Attorney for Defendant, to enter judgment for the defendant for costs.
 " " " Judgment entered.
 Jan. 8, 1910 Petition for allowance of Writ of Error.
 " " " Order of Court allowing Writ of Error without filing a bond.
 " " " Bill of exceptions.
 " " " Assignment of Error.
 " " " Waiver of submission of copy of Bill of Exceptions and of bond on appeal by attorneys for deft.
 " 10 " Citation issued.
 " " " Writ of error issued.
 " 12 " Citation returned, service accepted.
 " 21 " Agreement as to printing of record.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA.

Of October Term, 1906. No. 66.

The People of Porto Rico

v.

The Title Guaranty & Surety Company.

PRAECIPE FOR SUMMONS.

Issue summons in assumpsit.

Damages \$100,000. Returnable to next term.

WM. J. HAND,
Plaintiff's Attorney.

To the Clerk of said Court.
Sept. 26th, 1906.

(Endorsed: No. 66. October Term, 1906. The People of Porto Rico v. The Title Guaranty and Surety Company. Praecipe for Summons. Filed Sept. 26, 1906. E. R. W. Searle, Clerk. Wm. J. Hand, Plaintiff's Attorney.)

UNITED STATES,
MIDDLE DISTRICT OF PENNSYLVANIA, } *Sct.*

THE PRESIDENT OF THE UNITED STATES,

*To the Marshal of the Middle District of Pennsylvania,
Greeting:*

WE COMMAND YOU, that you summon The Title Guaranty and Surety Company, late of your District, if they may be found therein, so that they be and appear before the Judges of the Circuit Court of the United States, in and for the Middle District of Pennsylvania, of the Third Circuit, at a session of the same Court to

be holden at Scranton on the third Monday of October next, to answer to The People of Porto Rico. And have you then there this writ.

WITNESS, the Honorable Melville W. Fuller,
Chief Justice of the Supreme Court of
the United States, at Scranton, this 26th
(Seal) day of September, A. D. 1906, and in the
131st year of the Independence of the
United States.

E. B. W. SEARLE,
Clerk of Circuit Court.

(Endorsed: No. 66. Circuit Court, Oct. Sessions, 1906.
The People of Porto Rico v. The Title Guaranty
and Surety Co. Summons. 9/26/06. Came to
hand 2 o'clock P. M. Marshal's Docket No. 402.
C. B. Witmer, U. S. Marshal. Wm. J. Hand, At-
torney for Plaintiff. Marshal's fees \$2.00.)

And now, to wit, Sept. 28th, '06, I served the within
writ of summons upon the Title Guaranty and Surety
Company by showing this writ to D. B. Atherton, Sec.
of said company, and by making known to him the con-
tents thereof, and also by handing to and leaving with
him a true and attested copy of the same. Service of
this writ was made at Scranton, Pa., on the date above
mentioned.

So answers

CHAS. B. WITMER,
U. S. Marshal.

By
J. W. SNYDER,
Dep.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA.

October Term, 1906. No. 66.

The People of Porto Rico

v.

The Title Guaranty & Surety Company.

Enter our appearance for defendant company.

WILLARD, WARREN & KNAPP,

Attorneys.

E. R. W. SEARLE,

Clerk.

To Clerk Circuit Court.

Filed Oct. 3, 1906.

KNOW ALL MEN BY THESE PRESENTS, that I, Beekman Winthrop, Governor of Porto Rico, acting by and under authority of an Act of the Legislative Assembly of Porto Rico, approved March 8th, 1906, a copy whereof is hereto appended, do hereby make, constitute and appoint William J. Hand, Esq., of Scranton, Pennsylvania, the true and lawful attorney of The People of Porto Rico, in law and in fact, to institute for and in their name, a suit at law in a proper and convenient court of law against The Title Guaranty and Surety Company, formerly The Title Guaranty and Trust Company of Scranton, Penna., for recovery on the bond of The Vandegrift Construction Company, given to The People of Porto Rico, executed by said The Title Guaranty and Trust Company of Scranton, Penna., as a surety; and the same to conduct to trial and judgment in conjunction with the Attorney General of Porto Rico, in as speedy a manner as can reasonably be done;

and to conduct the prosecution of the said suit or action so to be brought, and to use all such lawful ways and means, in the name of The People of Porto Rico therein as may be requisite and proper; hereby confirming and sanctioning whatsoever the said attorney in the said suit, touching the prosecution thereof, may do, according to law in the premises.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of Porto Rico this 22nd day of June, A. D. 1906.

(Signed) BEEKMAN WINTHROP.

(Seal of Porto Rico)

THE PEOPLE OF PORTO RICO.

Office of the Secretary.

I, Regis H. Post, Secretary of Porto Rico, do HEREBY CERTIFY that the writing hereto attached is a true and correct copy of an Act of the Legislative Assembly of Porto Rico entitled "An Act to authorize the Governor of Porto Rico to employ local counsel in the United States to institute suit on the bond of the Vandegrift Construction Company of the State of New Jersey," approved March 8, 1906, the original being filed and of record in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of Porto Rico, at San Juan, this thirteenth day of October, in the year of our Lord One thousand nine hundred and six.

(Seal of
Porto Rico)

(Signed) REGIS H. POST,
Secretary of Porto Rico.

AN ACT

To Authorize the Governor of Porto Rico to Employ Local Counsel in the United States to Institute Suit of the Bond of the Vandegrift Construction Company of the State of New Jersey.

WHEREAS, the Vandegrift Construction Company of New Jersey as principal and the Union Surety Company of Philadelphia and the Title Guaranty and Trust Company of Scranton, Pennsylvania, as sureties, executed a bond in the sum of one hundred thousand dollars in favor of The People of Porto Rico, conditioned upon a compliance with the terms of a certain franchise granted by the Executive Council of Porto Rico to the said Vandegrift Construction Company; and

WHEREAS, the said Vandegrift Construction Company failed to complete the construction of the railroad provided for in said franchise, or any part thereof, within the time required by the conditions of said bond, and by reason thereof the said franchise has been duly revoked and annulled by the Executive Council and the Attorney General directed to institute suit on said bond; and

WHEREAS, in order to recover against the sureties of said bond suit must be brought in the courts of the State of Pennsylvania, therefore,

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF PORTO RICO:

SECTION 1.—That the Governor of Porto Rico be and he is hereby authorized to employ local counsel in the United States to represent The People of Porto Rico in the courts of the State of Pennsylvania, or elsewhere, in the prosecution of the recovery on said bond. And he is hereby authorized to contract with said counsel for the services to be rendered in the prosecution of

such suit upon such terms, including the payment of either a fixed or a contingent fee, as to him may seem just and reasonable.

SECTION 2.—That this act shall take effect from and after its approval.

Approved, March 8, 1906.

(Endorsed: No. 66 October Sess. 1906. The People of Porto Rico v. The Title Guaranty and Surety Company. Warrant of Attorney. E. R. W. Searle, Clerk U. S. Circuit Court. Sir: File the within warrant of attorney in the above proceedings. Wm. J. Hand, Atty. for Plff. Filed Dec. 13, 1906. E. R. W. Searle, Clerk.)

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA.

No. 66. October Sessions, 1906.

ASSUMPSIT.

The People of Porto Rico

v.

The Title Guaranty and Surety Company.

PLAINTIFF'S STATEMENT.

The People of Porto Rico, plaintiff, a body politic or corporation, (having governmental powers over the Island of Porto Rico and certain adjacent islands, dependencies of the United States of America), created by and organized under the laws of the United States of America, and deriving all its capacities and powers therefrom (viz., by and under an Act of Congress entitled, "An Act temporarily to provide revenues, and a civil government for Porto Rico and for other purposes," approved April 12th, 1900, and the several acts supplemental and amendatory thereto), by its attorney, William J. Hand, Esq., claims of The Title Guaranty and Surety Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, for the purpose, *inter alia*, of acting "as security for the faithful performance of any contract entered into with any person or municipal or other corporation or with any State or government, by any person or persons, corporation or corporations," and having its domicile and principal place of business in the City of Scranton, Pennsylvania, in said district, the sum of one hundred thousand dollars, which is justly due and payable to the plaintiff by the defendant upon the cause of action whereof the following is a statement:

On the second day of March, A. D. 1903, the Executive Council of Porto Rico, acting under authority of the power vested in them by the Act of Congress above cited, passed a certain ordinance entitled "An Ordinance granting to the Vandegrift Construction Company the right to build and operate a line of railway between the municipality of San Juan and the Playa of Ponce in the Island of Porto Rico, and to develop electric energy by water or other power for distribution and sale for railway, lighting and industrial purposes," which said ordinance was duly approved by the Governor of Porto Rico March 3rd, A. D. 1903, and by the President of the United States March 21st, A. D. 1903, a copy of said ordinance being hereto appended and made a part hereof, marked "Exhibit A." By the terms of said ordinance the said Vandegrift Construction Company was granted certain franchises, privileges, concessions and rights relative to the building and operating of a certain line of railway between certain designated points in said Island of Porto Rico, for the conveyance of persons and property for hire, and the further development of electrical energy by water or other power for distribution and sale for railway, lighting and industrial purposes, subject to the express right of the said Executive Council to amend, alter or repeal the same, and to certain other conditions therein expressed. The said ordinance was duly accepted in writing dated April 24th, 1903, by the said Vandegrift Construction Company, and subsequently, in further compliance with the requirements of said ordinance, the Vandegrift Construction Company as principal, and The Union Surety and Guaranty Company, and the defendant, whose corporate name was then The Title Guaranty & Trust Company of Scranton, Pennsylvania (being the name under which said defendant was originally incorporated, its name having been subsequently changed to The Title Guaranty and

Surety Company), as sureties, duly executed under their seals and delivered to the plaintiff their certain writing obligatory, commonly called a bond, dated May 23rd, A. D. 1903 (upon which this action is founded), wherein and whereby they acknowledge themselves and their successors, to be jointly and severally held and firmly bound to pay unto the plaintiff the sum of one hundred thousand dollars, conditioned that if the said principal fully completed the work authorized by said ordinance within three years after its acceptance by the Vandegrift Construction Company, in accordance with the conditions contained in said ordinance, and performed other conditions therein expressed, as by reference thereunto being had will fully appear, then said obligation to be void, otherwise to be in full force and effect; it being further expressly stipulated in said bond that no extension of the time or times limited in said ordinance for the completion of the work therein authorized or any part thereof should in anywise discharge the sureties from liability upon said bond; said bond having been executed under defendant's corporate seal and delivered, on behalf of the defendant, by its duly authorized and empowered agents resident in the City of Washington, D. C., a copy of said bond being hereunto appended and made a part hereof, marked "Exhibit B." Said bond, after its execution and delivery to plaintiff by the said obligors, was on the 4th day of June, A. D. 1903, duly approved as to its form and sufficiency by the proper officials, as provided in said ordinance, and thereupon became fully binding upon the obligors, including the defendant, said bond having furthermore been formally accepted by the Executive Council of Porto Rico on June 8th, 1903.

Thereafter, the Vandegrift Construction Company assigned the rights and franchises granted by said ordinance to Porto Rico Railway, Light and Power Company, as was contemplated and provided for in said

ordinance, and said latter company commenced the construction of the works authorized by said ordinance, but proceeded with the work specified and required to be done so slowly, and with such lack of diligence, that it failed to comply with and broke the conditions of the said ordinance and bond, and was in default in accordance with the terms thereof, in that it had not within one (1) year from the date of the acceptance of said ordinance caused the roadbed of the said railway to be completely graded between the Island of San Juan and the urban portion of the municipality of Caguas, and had not caused the approaches and foundations of its proposed bridge across the body of water flowing through the Boqueron into the harbor of San Juan to be completed, nor contracted for the material necessary for the superstructure of said bridge as provided by Section 15 of said ordinance, and further had not caused the power-dam at Comerio Falls to be completed within one (1) year from the date of acceptance of said ordinance, nor had under contract within said period the major part of the electrical apparatus necessary for the transformation of the power to be obtained therefrom into electric energy, as provided by the first part of Section 18 of said ordinance; and the said principal, and its assignee aforesaid, being so in default under the terms of said ordinance and bond, in order to prevent the forfeiture of the said bond and the repeal of the franchises granted by said ordinance, in accordance with the respective provisions thereof, by reason of such default, requested an extension of the time for the completion of the work provided to be done, in Sections 15 and 18 of the said original ordinance, within one year from the date of its acceptance; whereupon, the Executive Council of Porto Rico, relying upon the authorization for such extension of time granted by the express terms of said bond executed by

the Vandegrift Construction Company and its sureties above named, passed on July 7th, A. D. 1904, an ordinance, amending the above-mentioned original ordinance, and providing that the time for the completion of the said work upon which default had been made as above stated should be extended until the first day of January, A. D. 1905, upon consideration of the fulfillment of certain conditions, therein expressed, by the grantee under said original ordinance, which said amending ordinance was duly approved by the Governor of Porto Rico on July 18, A. D. 1904, and by the President of the United States on August 2nd, A. D. 1904, and was duly accepted by the grantee under said original ordinance, a copy thereof being hereto appended, and made a part hereof, marked "Exhibit C." Nevertheless, neither the Vandegrift Construction Company, nor its assignee aforesaid, complied with the conditions and requirements of the said original ordinance as so amended, but broke the conditions of the said bond, in that it failed to cause the roadbed of said railway to be completely graded between the Island of San Juan and the urban portion of the municipality of Caguas, and the approaches and foundations of its proposed bridge across the body of water flowing through the Boqueron into the harbor of San Juan to be completed, and failed to contract for the material necessary for the superstructure of said bridge, and failed to complete the power-dam at Comerio Falls, and to have under contract the major part of the electrical apparatus necessary for the transformation of the power to be obtained therefrom into electric energy, before the first day of January, A. D. 1905, as required by Sections 15 and 18 of the original ordinance, as amended, having failed in all respects to substantially comply with any of said conditions and requirements, and having abandoned, prior to said last mentioned

date, all work provided to be done by said ordinance; and thereby failed to comply with the provisions of said bond to the effect that the principal should within three years from the date of the acceptance by it of said ordinance fully complete the work therein authorized in accordance with the conditions therein contained, and should duly perform within the said period of three years all other terms and conditions in said ordinance required to be performed by the principal within said period,—the plaintiff having performed on its part all the duties required to be performed by it, or its agents, or officials.

Whereupon, in accordance with the right reserved in the said original ordinance and expressly stipulated in the said amending ordinance, the Executive Council did, because of such default on the part of the Vandegrift Construction Company and its assignee aforesaid, on the 24th day of February, A. D. 1905, pass an ordinance repealing both the said original ordinance and its amendments, and revoking and forfeiting to the People of Porto Rico all the rights, privileges and concessions appertaining to the said franchise granted by said ordinances, and declaring all sureties and obligations theretofore given by the Vandegrift Construction Company as a guaranty of the faithful performance of the obligations and conditions set forth in said ordinance forfeited to the People of Porto Rico, which said last recited ordinance was approved by the Governor of Porto Rico on the 18th day of March, A. D. 1905, and by the President of the United States on the 12th day of May, A. D. 1905, a copy whereof is hereto appended and made a part hereof, marked "Exhibit D."

Wherefore, and by reason of the premises, the said bond became forfeited and the liability of the said above-named defendant, jointly and severally with the

other obligors named in the said above-recited bond, became absolutely and definitely fixed to pay to the plaintiff the sum of one hundred thousand dollars; the default and failure of the principal in said bond to perform the conditions thereof having caused great and serious damage to the plaintiff, which said damages, being in their nature uncertain, unascertainable with exactness, and not measurable by any exact pecuniary standard, but being dependent upon extrinsic considerations and circumstances, were by the terms of the said bond liquidated at the sum of one hundred thousand dollars; and thereby an action has accrued to the plaintiff to demand and have from the defendant the said sum of one hundred thousand dollars, specified in said bond, yet the said defendant, though often requested thereto, has not, nor has the principal nor the other surety named in the said bond, nor anyone on its or their behalf, paid the said sum or any part thereof, but has neglected and refused, and still neglects and refuses to pay the same or any part thereof, to the damage of the plaintiff of the sum of one hundred thousand dollars, and therefore the plaintiff brings this suit, etc.

(Signed) WM. J. HAND,
Attorney for Plaintiff.

EXHIBIT A.

AN ORDINANCE GRANTING TO THE VANDEGRIFT CONSTRUCTION COMPANY, THE RIGHT TO BUILD AND OPERATE A LINE OF RAILWAY BETWEEN THE MUNICIPALITY OF SAN JUAN AND THE PLAYA OF PONCE IN THE ISLAND OF PORTO RICO, AND TO DEVELOP ELECTRIC ENERGY BY WATER OR OTHER POWER FOR DISTRIBUTION AND SALE FOR RAILWAY, LIGHTING AND INDUSTRIAL PURPOSES.

Be it ordained and enacted by the Executive Council of Porto Rico:

1 Section 1. That the Vandegrift Construction Company,
2 a corporation organized under the laws of the State of New
3 Jersey assignee of Walter M. Yeager, be and it is hereby author-
4 ized and empowered to construct, maintain and operate a rail-
5 way in Porto Rico for the conveyance of persons and property
6 for hire, from the municipality of San Juan to the Playa of Pon-
7 ce, and through intermediate points, substantially along the
8 following route to be subsequently prescribed in detail by the
Executive Council:

10 Beginning at a point in the municipality of San Juan, to
11 be subsequently determined by the Executive Council, thence
12 by a line parallel with the southerly side of the right of way of
13 the Compañía de los Ferrocarriles de Puerto Rico, now the
14 American Railroad Company of Porto Rico, to a point at or
15 near Mantin Peña; thence in a southerly direction following the
16 valley of the Rio Pidras to a summit about three miles west-
17 wardly from Trujillo Alto; thence southeastwardly to a point
18 in the valley of the Rio de Loiza; thence by the valley
19 of the said Rio de Loiza to a point in the insular road
20 eastwardly from the urban portion of the municipality of

1 Caguas; thence by said insular road through the urban
 2 portion of the municipality of Caguas, and thence diverging to
 3 the valley of the Rio Gurabo; thence along the valley of the
 4 Rio Gurabo to its head waters; thence across the summit
 5 known as Las Cruces to the valley of a branch of the Rio de
 6 la Plata; thence along same to its intersection with the mil-
 7 itary road; thence along the military road to and through the
 8 urban portion of the municipality of Cayey; thence along the
 9 general line of the old trail leading from Cayey to Salimas to a
 10 point near the summit of the Cordillera; thence parallel in
 11 general with said summit, crossing the same at or near the
 12 headwaters of the Rio de Cuyón; thence through the valley of
 13 the Rio de Cuyón to a point in the military road eastwardly
 14 from the urban portion of the municipality of Coamo; thence
 15 by the military road to and through Coamo; thence following
 16 the Rio Coamo and alongside the public road to Coamo
 17 Springs to a point at or near the latter place; thence to a
 18 point near the easterly limits of the urban portion of the
 19 Municipality of Juana Diaz; thence along and upon the side
 20 of the military road to and through Juana Diaz; to Ponce;
 21 thence by some route to be subsequently determined by
 22 the Executive Council to the Playa of Ponce.

23 The line of said railway shall not pass less than two miles
 24 southwesterly of the principal plaza of the town of Rio Piedras,
 25 or less than three miles easterly of the principal plaza of the
 26 town of Bayamon, without the special consent of the Executive
 27 Council. No part of said railway line shall be constructed

1 or condemnation proceedings for a right of way therefor be
2 instituted by the grantee, until the exact location of that part
3 of the proposed right of way shall have been approved by the
4 Executive Council.

5 Section 2. That part of said railway lying between Juana
6 Diaz and Ponce may run alongside or upon the military road,
7 according to the discretion of the Commissioners of the
8 Interior as to location, construction, maintenance and repair of
9 the said railway and military road, bridges, culverts and walls,
10 but all sidetracks or any second or double track shall be
11 laid outside of said military road on property acquired by
12 the grantee for that purpose.

13 Section 3. The grantee, without the further consent of
14 the Executive Council, shall not accept passengers or freight
15 either for hire or otherwise for transportation either way
16 between any part of the urban portion of the municipality of
17 San Juan and Martin Peña, or for transportation either way be-
18 tween any part of the urban portion of the municipality of Pon-
19 ce and the Playa of Ponce. For each and every breach by the
20 grantee of the terms of this section a penalty of one hundred
21 dollars shall be recoverable in any court of competent jurisdic-
22 tion as liquidated and agreed damages by The People of Porto
23 Rico or by any person, firm or corporation enjoying the franchise
24 and privilege under a lawful grant of transporting goods and
25 passengers between the points in this section set forth.

26 Section 4. The grantee, with the approval of the Commis-
27 sioner of the Interior, may acquire by purchase or otherwise

1 such property as may be necessary for the construction
2 and maintenance of branch roads to plantations, central factor-
3 ies or warehouses for sugar, coffee, tobacco or other products,
4 provided that in all such cases where the proposed branch road
5 shall rest upon any public highway or street or other public
6 property, the special consent of the Executive Council shall
7 first be obtained. But no royalty or other form of compensa-
8 tion shall be exacted from the grantee for such consent.

9 Section 5. The gauge of the railway line to be constructed,
10 maintained, and operated under the terms hereof shall be the
11 standard gauge of four feet and eight and one half inches in
12 width. The right of way of said railway shall not exceed four (4)
13 rods in width, with such additional width as may be necessary
14 for the slopes of cuts and embankments; and the grantee may
15 construct and maintain outside thereof such turnouts, switches
16 spurs, branches and sidings as may be necessary or convenient
17 for the operation of said line; provided that nothing in this
18 section contained shall be construed or deemed to give to the
19 grantee any right of way on said military road or on any other
20 public highway, except as provided in sections 7 and 8 hereof;
21 the space occupied by any track on said military road or other
22 public highway shall be open to use to the public.

23 Section 6. The said railway shall be operated by electric
24 power, but during the course of construction thereof may be
25 operated by steam or other power. The operation of the said
26 railway shall be subject to all times to such police regulations
27 as may be established by law; and at grade crossings and other

1 points of danger the Commissioner of the Interior in his sole dis-
2 cretion may require the grantee to maintain gates, guards or
3 other form of protection.

4 Section 7. The grantee may construct on its roadbed
5 acquired hereunder either a single or a double track road; prov-
6 ided that wherever its road is constructed upon or across any
7 part of a public highway or passes through the streets of any
8 municipality, it may lay or operate a double track without
9 the special consent of the Executive Council; but no royalty
10 or other form of compensation shall be exacted from the
11 grantee for such consent.

12 Section 8. Except between Juana Diaz and Ponce as herein-
13 before provided, and except through the urban portions of
14 municipalities, at approaches to and on bridges which in the
15 judgement of the Commissioner of the Interior may safely and
16 properly be used, and at places where, in the sole judgement of
17 the Executive Council, insuperable engineering difficulties are
18 presented in the construction of said railway line upon an
19 acquired right of way, the grantee, between San Juan and Pon-
20 ce, may not construct its said railway upon the said military road,
21 or within the space reserved therefor or upon any other public
22 highway; but this prohibition shall not be held to forbid or pre-
23 vent the crossing of said military road or any such highway
24 by said railway wherever the needs of the grantee require the
25 right of way to change from one side of said military road or
26 highway to the other side thereof. But no such crossing shall
27 be made except at points and upon plans first approved by the

21
1 Commissioner of the Interior.

2 Section 9. Wherever said railway crosses or rests upon the
3 military road or other public highway, the roadbed between the
4 tracks and for a space of a foot and a half on either side thereof
5 shall be maintained by the grantee in a state of repair satisfac-
6 tory to the Commissioner of the Interior; and such roadbed
7 shall be constructed and maintained so as not to interfere with
8 the proper drainage of such road or highway.

9 Section 10. Whenever directed by the Commissioner of
10 the Interior so to do the track of the grantee where it crosses
11 or rests upon said military road or other public highway shall
12 be altered or repaired by the grantee in accordance with plans
13 approved by said Commissioner; and upon the failure of the
14 grantee to make such alteration or repairs they may be made
15 by the said Commissioner, and the cost thereof shall be recov-
16 erable against the grantee as a first lien upon all of its rights
17 and property hereunder.

18 Section 11. Free right of way for said railway and over-
19 head trolley construction, together with branch power trans-
20 mission pole lines from the power stations to the main line, is
21 hereby granted through and over all insular public lands and
22 through all municipalities and towns and the lands, streets
23 and highways thereof; provided, however, that the location
24 of said right of way and of all such poles and lines
25 shall be first approved by the Commissioner of the Interior,
26 except at points where the right of approval is herein reserved
27 to the Executive Council. And when directed by the Executive

1 Council or the Commissioner of the Interior so to do any such
2 pole or power lines shall be renewed or relocated by the grantee.

3 Section 12. Each and everything authorized to be done,
4 acquired, constructed, built, operated or maintained by or under
5 this ordinance, including all necessary roadbeds, tracks, side-
6 tracks, spurs and branch roads, all cuts, fills, embankments and
7 drainage canals, all overhead trolley and power transmission lines,
8 poles and wires, all dams, reservoirs, canals, pipe lines,
9 sluices, waterways and power plants, and all bridges, ferries,
10 wharves, stations, terminals, depots and buildings, and the
11 approaches thereto, are matters of public interest conducing
12 to the general welfare, and are therefore hereby declared to
13 be of public utility for all purposes; and all lands necessary
14 for the construction, operation and maintenance of the said
15 railway or any part thereof, or of said roadbed, tracks, side
16 tracks, branch roads, cuts, fills, embankments, drainage canals,
17 overhead trolley and power transmission lines, poles, wires,
18 dams, reservoirs, canals, pipe lines, sluices, power plants,
19 bridges, ferries, wharves, stations, terminals, depots and
20 buildings connected therewith, and the approaches thereto
21 may be acquired by the grantee by purchase or grant or by
22 process of condemnation or forcible expropriation.

23 Section 13. The grantee, with the approval of the Commis-
24 sioner of the Interior and upon reasonable notice to the owner
25 or agent thereof is authorized at all times to enter upon and
26 occupy private and public lands and property for the purpose
27 of making surveys or determining the route of the lines or

1 the location of dams, power houses, poles, lines and other
2 matters entering into the construction or operation of said
3 electric railway.

4 Section 14. An accurate survey of the route of the said
5 railway shall be submitted by the grantee through the Com-
6 missioner of the Interior for the approval of the Executive
7 Council within three months from the date of the acceptance
8 of this ordinance by the grantee as hereinafter provided; and
9 all plans for roadbeds, tracks, side-tracks, bridges, embank-
10 ments and for the general construction of the said railway shall
11 be submitted to the Commissioner of the Interior and be approved
12 by him before the work of building the same shall proceed.

13 Section 15. Within one year from the date of such accep-
14 tance hereof the grantee shall cause the roadbed of said railway
15 to be completely graded between the island of San Juan and the
16 urban portion of the municipality of Caguas; and shall also
17 cause the foundations and approaches of its proposed bridge
18 across the body of water flowing through the Boqueron into
19 the harbor of San Juan to be completed, and shall have con-
20 tracted for the material necessary for the superstructure of
21 such bridge.

22 Section 16. Within two years from the date of such ac-
23 ceptance hereof the grantee shall have completed and in read-
24 iness for service for the conveyance of passengers and freight,
25 those parts of said railway lying between the urban
26 portions of the municipalities of San Juan and Caguas and be-
27 tween the urban portions of the municipalities of Ponce and Jua

1 Diaz, respectively. It is however expressly understood and
2 agreed that upon the failure by the grantee to complete and have
3 its proposed line in full operation across the island within the
4 time limited in section 17 hereof, or upon its failure thereafter
5 to continue the full operation of said railway line across the
6 island, its right to operate any portion of the railway line in
7 this ordinance authorized, or to distribute and sell electric
8 light and power as herein granted, shall cease and deter-
9 mine and shall be taken and deemed to be forfeited and
10 at an end; unless such failure shall be deemed and declared
11 by the Executive Council to be due to the act of God or the
12 public enemy or to an injunction, entered in a judicial procee-
13 ding of such character, that the Executive Council in its sole
14 judgment may deem such injunction sufficient cause for an
15 extension of any of the several periods of time limited herein.

16 Section 17. Within three years from the date of such ac-
17 ceptance hereof the grantee shall have completed and in opera-
18 tion the entire line of railway herein authorized from its terminal
19 in the municipaltiy of San Juan to its terminal on the Playa of
20 Ponce.

21 Section 18. The grantee shall cause the power-dam at
22 Comerio Falls to be completed within one year from the
23 date of the acceptance hereof as herein provided; and shall
24 within the same period have under contract the major part of the
25 electrical apparatus necessary for the transformation of the
26 power to be obtained therefrom into electric energy. The
27 entire power plant and transmission lines necessary for operating

1 said railway shall be completed within three years from the
2 date of the acceptance hereof.

3 Section 19. The grantee is hereby authorized and em-
4 powered to construct, acquire, maintain and operate power plants
5 at and in the neighborhood of the place know as "Comerio
6 Falls," on the river known as the "Rio de la Plata," and at
7 the place known as "El Peñon" on the river known as the "Rio
8 de Loiza" and at other places on either or both of said rivers,
9 for the purpose of converting the water power of the said
10 rivers into electric energy for the operation of said railway,
11 and for the promotion of the concessions, rights and privileges
12 granted herein; and to use the waters of the said rivers for
13 said purposes free from interference or detention except as
14 to rights heretofore acquired therein by others; said waters after
15 being so used shall be returned to the channel of the river; and
16 the grantee may construct, acquire, maintain and operate such
17 dams across the said rivers, or either of them, and upon the lands
18 of the abutting owners as may be necessary for the proper use
19 of said waters and the operation of the machinery necessary to
20 generate such electric energy; and may construct, maintain and
21 operate the necessary reservoirs, canals, pipe lines, sluices,
22 waterways, poles, wires and other appurtenances for the gen-
23 eration, development and transmission of electricity, for the
24 operation of said railway and for lighting, industrial and other
25 purposes; and may convey and distribute light and power to
26 any persons, corporations and municipalities, and, subject
27 to the rights herein reserved to the Executive Council,

1 may regulate the time and manner in which said lighting
 2 and power shall be delivered and the compensation to be
 3 received therefor; and, subject to approval as herein provided,
 4 may locate, construct and maintain lines of poles necessary to
 5 carry wires for the transmission of light and power along the
 6 line of survey of any completed or uncompleted public road or
 7 highway, or along any other route or routes that may be
 8 required by it. All such dams, reservoirs, canals, pipe lines,
 9 sluices, waterways, poles, wires and other appurtenances, are
 10 hereby declared to be of public utility for all purposes.

11 But it is expressly agreed and understood that no private
 12 property shall be used for any of the purposes in this section
 13 set forth until the right to the use thereof or the title thereto
 14 shall have been acquired by the grantee by purchase, condem-
 15 nation, private agreement or otherwise; nor shall any part of
 16 any public road or highway or any public lands or other prop-
 17 erty, whether municipal or insular, be used for the purposes
 18 in this section provided until the plans and specifications for
 19 such use thereof have been approved by the Commissioner of
 20 the Interior or by the Executive Council, as hereinafter or
 21 hereinbefore provided.

22 Section 20. The grantee, subject to the approval of the
 23 Commissioner of the Interior and only upon the plans and speci-
 24 fications to be submitted to him for that purpose, shall have
 25 the right to cross, intersect, join or unite its said railway lines
 26 with any other railway line heretofore constructed or hereafter
 27 to be constructed in Porto Rico at any point on its route and

1 upon its own lands or upon the lands of such other railway;
2 and may construct and maintain all such turnouts, swithes and
3 other conveniences as may be necessary for said purposes; but
4 no such use shall be made of the property of any other railway
5 except upon the payment of just compensation. And any
6 railway line heretofore or hereafter to be constructed, shall have
7 the right, subject to like approval by the Commissioner of the
8 Interior and to the payment of just compensation, to cross,
9 intersect, join or unite with the railroad lines of the grantee
10 hereunder; and for that purpose may construct and maintain
11 all such turnouts, switches and other conveniences as may be
12 necessary therefor.

13 Section 21. The grantee shall have the power to lease,
14 purchase or operate any other line or lines of railway now
15 existing or hereafter constructed; but no such lease, purchase
16 or operating contract shall be entered into except upon the
17 consent of the Executive Council and upon such terms as may
18 be approved by it. In granting its approval of any such lease,
19 purchase or operating contract the Executive Council may
20 extend all the benefits and rights hereunder to any such leased,
21 purchased or operated lines or may impose further conditions
22 upon the grantee and upon such leased, purchased or operated
23 lines.

24 Section 22. The grantee may furnish electric light and
25 power at all points along the line of its said railway and at
26 any and all other places in the island of Porto Rico; provided
27 that such right to furnish light and power shall not extend

1 to any place, except upon the special consent of the Exeo-
2 nutive Council, where such right has heretofore been granted
3 by the Executive Council to any other person, firm or corpora-
4 tion, or exists under any other lawful grant or license. The
5 Executive Council reserves the right to regulate and from
6 time to time to amend or alter the tariff of charges to be made
7 by the grantee for the distribution and sale of electric
8 light or power to private consumers; and before distri-
9 buting light or power to private consumers the grantee shall
10 present a schedule of charges to the Executive Council for its
11 approval. The Executive Council reserves the right however
12 to require the grantee in the distribution and sale of the
13 surplus electric energy developed on the Rio de Loiza and not
14 needed in the operation of its said railway lines to give the
15 preference to the municipality of San Juan over other private
16 consumers to the extent of 100 horse power.

17 Section 23. The grantee shall pay to the Treasurer of
18 Porto Rico for the use and benefit of the insular government
19 an annual royalty of two per cent of the gross receipts ac-
20 cruing to the grantee from the sale and distribution of elec-
21 tric light and power to private consumers; the payment of
22 said royalty shall be made at such times and under such con-
23 ditions and regulations as the Treasurer from time to time shall
24 establish; and for the purpose of ascertaining the amount due
25 to the Treasurer by way of royalty under the terms of this
26 section the Treasurer and such officials as he may from time
27 to time designate shall have access at all times to the books

1 of said grantee, and may from time to time demand from any
2 officer, agent or employee of said grantee sworn statement
3 in relation to its distribution of electric light and power.

4 Section 24. A schedule of transportation charges for pas-
5 sengers, freight and express matter, shall be printed and at all
6 times be kept posted at some prominent place in each station of
7 the grantee; and copies thereof shall be furnished to the Com-
8 missioner of the Interior. No such schedule may be changed or
9 modified by the grantee until notice thereof shall have been
10 posted upon the prior schedule for a period of ten days, and until
11 like notice shall have been given to the Commissioner of the
12 Interior. No reduction or rebate from the schedule so posted
13 shall be given by the grantee to any shipper.

14 Section 25. The charge for the transportation of pas-
15 sengers on the lines of the said railway shall not exceed four
16 (4) cents per mile; provided that for a single ride a minimum
17 charge of five (5) cents may be made. School children shall
18 be transported at reduced rates. The charge for the
19 transportation of freight in bulk, except perishable and
20 special freight, shall not exceed sixteen (16) cents per ton per
21 mile for distances in excess of ten miles. For shorter distan-
22 ces and for freights in less than ton lots, as well as for package
23 and perishable freight and express matter, the charges, subject
24 to the provisions of Section 26 hereof, may exceed the above
25 rate.

26 Section 26. All rules and regulations of the said grantee
27 for the operation of its said railway lines shall be subject to

1 revision, amendment, change or alteration by the Executive
 2 Council at any time; and the Executive Council may regulate
 3 the speed of cars on said railway lines. And all transporta-
 4 tion charges shall be subject to such regulation, revision,
 5 amendment, change or alteration as the Executive Council
 6 from time to time may require. But in view of the public
 7 benefits to result from the construction by the grantee of its
 8 said electric railway across the island the Executive Coun-
 9 cil now gives solemn expression to its belief that public
 10 interests may best be served by now declaring that the maxi-
 11 mum rate of charges in the foregoing section established
 12 ought not to be diminished or reduced for a fixed term of
 13 twenty-five years from the date of the acceptance hereof by the
 14 grantee.

15 Section 27. The grantee shall transport free of charge on
 16 its said railway line or upon any branch thereof to and from
 17 the courts and prison of the island any prisoner awaiting trial
 18 or who has been convicted of any offense against the penal code
 19 or against any police regulation, or any prisoner under order to
 20 be transferred from one prison to another; together with such
 21 police or other guards as may reasonably be necessary to
 22 guard such prisoners on such journeys; provided however that
 23 all such prisoners and guards shall be furnished with a state-
 24 ment by a judge of a court certifying that said prisoners
 25 are needed in court or that they have been convicted and are
 26 on their way to prison, or a certificate by the Attorney-General
 27 or the Director of Prisons or the warden of a prison that such

1 prisoners are being transferred from one prison to another.

2 Section 28. The grantee shall convey free of charge
3 officers and members of any insular police or militia force
4 when said officers and members are in uniform and are in the
5 performance of their duty, or when not in uniform but on
6 some special service they produce a written order for free
7 transportation signed by the Governor or any of the heads
8 of the general departments of the government; provided
9 however that in the absence of a previous notice of at least
10 two days the number of such officers and members to be
11 transported at any one time shall not exceed fifteen. The
12 grantee, upon the written order of the Commissioner of the
13 Interior, shall also convey free of charge, any employee of
14 the Interior Department when on special service in connection
15 with the inspection or supervision of the works herein author-
16 ized.

17 Section 29. The grantee may erect and maintain a tele-
18 graph and telephone line upon and along its right of way to
19 be used by it in connection with the operation of its railway lines
20 and power plants and their appurtenances; but said telegraph
21 and telephone line shall in no event be opened to use by the
22 public for hire or otherwise, unless express authority so to do is
23 hereafter granted by the Executive Council. And for each breach
24 of this provision the grantee shall be subject to a penalty of one
25 hundred dollars as agreed and liquidated damages to be recover-
26 able in a court of competent jurisdiction by the insular govern-
27 ment or by the grantee in any valid and existing ordinance or

1 lawful grant for the operation of any general or special tel-
2 ephone system in the island.

3 Section 30. The term grantee as herein used shall be held to
4 extend to and include the Vandegrift Construction Company
5 and its successors and assigns; and in case of the transfer
6 by the grantee either by its own act or by act of law of the
7 property and property rights acquired hereunder, the purchaser
8 or assignee shall be bound by all the terms hereof of every
9 name and nature. It is expressly understood and agreed
10 that all the property interests and rights of the grantee, includ-
11 ing this franchise and all rights and benefits accruing here-
12 under, may be conveyed in trust or by way of mortgage or
13 otherwise to secure the payment of any lawful obligations
14 of the grantee, its successors or assigns; and the trustee or
15 the holder or holders of any obligation or obligations so secur-
16 ed shall have the right to foreclose or otherwise assert their
17 rights thereon in any competent court as other similar
18 obligations are foreclosed or enforced; and the purchaser or the
19 first assignee of any purchaser at any foreclosure sale shall be
20 deemed a lawful assignee hereunder, as if such sale and first
21 assignment had been specially approved by the Executive
22 Council; provided that no person, firm or corporation owning,
23 or operating or that is the lessee of any railway line or
24 electric light and power plant, may, without the express consent
25 of the Executive Council, become the purchaser at any
26 such foreclosure sale or be the first assignee of any such
27 purchaser. It is further expressly understood that the privileges,

1 franchises and concessions granted under this ordinance and
2 all rights and benefits accruing thereunder and all property
3 interests and rights connected therewith may be assigned, sold,
4 transferred or set over to the "Porto Rico Railway, Light and
5 Power Company," a corporation about to be organized for that
6 purpose; but no other assignment thereof shall be valid until
7 approved by the Executive Council. The People of Porto Rico
8 may purchase or take the property of the grantee at a fair and
9 reasonable valuation. No stock or bonds shall be issued by
10 said grantee except in exchange for actual cash or property at
11 a fair valuation equal in amount to the par value of the stock
12 or bonds issued; nor shall stock or bond dividends be declared
13 or paid. The rights, privileges and concessions herein granted
14 shall be subject to amendment, alteration or repeal by the Exe-
15 cutive Council.

16 Section 31. In case of any legislation modifying or alter-
17 ing the form of government for the Island of Porto Rico, all the
18 rights, privileges, duties and discretions herein reserved to the
19 Executive Council shall be performed, exercised, executed and
20 become the joint duties, privileges, rights and discretions of the
21 governor and the heads of the several departments of govern-
22 ment acting collectively and by a majority vote; and in case of
23 such modification or change by subsequent legislation the rights,
24 duties, discretions, and obligations reserved herein to the Com-
25 missioner of the Interior shall be performed by that officer of the
26 insular government whose duties may most nearly correspond
27 to the present duties of the Commissioner of the Interior.

Section 32. The term "railway" as herein used shall extend to and include the necessary roadbed, tracks, side-tracks, switches, cuts, fills, embankments and drainage canals, spurs, branch roads, overhead trolley and transmission lines, poles, wires, signal systems, dams, resevoirs, canals, pipe lines, sluices, waterways, power plants, bridges, ferries, wharves, stations, terminals, depots and buildings, and the appurtenances to the same, and each and every thing necessary to the complete enjoyment and exercise of all of the rights, privileges and concessions herein granted.

Section 33. This ordinance shall not be valid or become operative until approved by the President of the United States. And the grantee shall obtain his approval within sixty days from the date of the approval hereof by the Governor of Porto Rico.

Section 34. The franchise, privileges, concessions and rights herein granted shall be accepted by the grantee in writing and by executing a bond in favor of The People of Porto Rico, in the sum of one hundred thousand dollars satisfactory in form to the Attorney-General and as to sufficiency to the Treasurer, and conditioned upon the full completion of the work herein authorized within three years after such acceptance and in accordance with the conditions herein contained, and in accordance with the plans and specifications therefor approved as herein provided; and conditioned also upon the payment by the grantee to The People of Porto Rico of any loss or damage or costs accruing against The People of Porto Rico, by reason of the construction of the works

1 herein authorized, at any time during the period of con-
2 struction herein limited and before the completion thereof
3 shall have been certified by the Commissioner of the Interior
4 as in section thirty-five provided. Such written acceptance
5 and bond shall be filed with the Executive Council within
6 sixty days after this ordinance shall have been approved by
7 the Governor of Porto Rico. Upon the approval and acceptance
8 of said bond, the sum of ten thousand dollars now on deposit
9 with the Treasurer of Porto Rico as a guaranty of the
10 acceptance by the grantee of this ordinance, shall be returned
11 to the grantee.

12 Section 35. Upon the presentation of a certificate from
13 the Commissioner of the Interior showing the completion of the
14 work herein authorized, and upon the full compliance with the
15 terms of this ordinance to the satisfaction of the Executive
16 Council, and upon the full payment by the grantee of any loss,
17 damage and costs accruing against the people of Porto Rico as in
18 said bond provided, the said bond shall be canceled and returned
19 to the grantee.

20 Section 36. The duration of the franchise, privileges con-
21 cessions and rights herein granted shall be ninety-nine years
22 from the date of the acceptance hereof as hereinbefore provided.

23 Section 37. It is understood and agreed that the essence
24 of this ordinance is a grant to the Vandegrift Construction
25 Company, its successors and assigns duly authorized under the
26 terms hereof, of the right to construct, maintain and operate
27 a railway line across the island; and that the grant of the

1 right to distribute and sell electric light and power is
 2 incidental thereto and is made only for the purpose of en-
 3 abling the said company to make the most economical use
 4 of its power plant constructed under the authority hereof.
 5 It is therefore expressly agreed that the grantee shall not
 6 distribute light or power until at least twenty-five kilometers
 7 of its proposed railway line are in actual operation.

8 Section 38. This ordinance when approved by the Governor
 9 and by the President, shall take effect immediately upon the
 10 acceptance by the grantee of the terms and conditions hereof as
 11 above provided.

Done in open session of the Executive Council of Porto
 Rico on this the second day of March in the year of our Lord
 nineteen hundred and three.

(Signed) CHAS. HARTZELL,
President of the Executive Council.

Approved this the third day of March, A. D., 1903.

(Signed) W. H. HUNT,
Governor of Porto Rico.

Approved this the 21st day of March, A. D., 1903.

(Signed) THEODORE ROOSEVELT,
President of the United States.

THE PEOPLE OF PORTO RICO.**OFFICE OF THE SECRETARY.**

San Juan, October 15, 1906.

I, REGIS H. POST, Secretary of Porto

Rico, do hereby certify that the foregoing twenty-one printed pages are a true copy of an ordinance entitled "An ordinance granting to the Vandegrift Construction Company, the right to build and operate a line of railway between the municipality of San Juan and the Playa of Ponce in the Island of Porto Rico, and to develop electric energy by water or other power for distribution and sale for railway, lighting and industrial purposes" as the said ordinance appears upon the official record in my custody of the proceedings of the Executive Council of Porto Rico at a meeting held on the second day of March, A. D., 1903. I further certify that the said ordinance was duly approved by the Governor of Porto Rico on the third day of March, A. D. 1903; as appears by the official records in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and the great seal of Porto Rico, at the Capital, on this fifteenth day of October in the year of our Lord nineteen hundred and six, and of the Independence of the United States the one hundred and thirty-first.

(SEAL)

REGIS H. POST,
Secretary of Porto Rico.

"EXHIBIT B."

KNOW ALL MEN BY THESE PRESENTS, that we, the VANDEGRIFT CONSTRUCTION COMPANY, a corporation duly organized under the laws of the State of New Jersey, hereinafter called the Principal, as Principal, and The Union Surety and Guaranty Company, of Philadelphia, a corporation duly organized under the laws of the State of Pennsylvania, and The Title Guaranty and Trust Company, of Scranton, Pennsylvania, a corporation duly organized under the laws of the State of Pennsylvania, hereinafter called the Sureties, as Sureties, are held and firmly bound unto the People of Porto Rico, hereinafter called the Obligee, in the sum of ONE HUNDRED THOUSAND DOLLARS, good and lawful money of the United States, for the payment whereof said Principal binds itself and its successors, and said Sureties bind themselves and their successors jointly and severally firmly by these presents.

WHEREAS, by virtue of a certain ordinance enacted by the Executive Council of Porto Rico, on the 2nd day of March, 1903, and approved by the Governor of Porto Rico on the 3rd day of March, 1903, granting to said Principal the right to build and operate a line of railway between the Municipality of San Juan and the Playa of Ponce in the Island of Porto Rico, and to develop electric energy by water or other power for distribution and sale for railway, lighting and industrial purposes, a copy of which ordinance is hereto annexed, the said Principal has undertaken and agreed to build and put in operation a line of railway between the Municipality of San Juan and the Playa of Ponce, in the Island of Porto Rico, and to build and equip power plants to develop electric energy for the operation of said railway and for other purposes within the period of three years from the date of the acceptance of the said ordinance by the said Principal.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH THAT IF THE SAID Principal shall within three

years from the date of the acceptance by it of said ordinance fully complete the work therein authorized in accordance with the conditions therein contained and in accordance with the plans and specifications therefor approved as therein provided; and within the said period of three (3) years from the date of the acceptance by it of the said ordinance shall build, complete and have in operation the entire line of railway authorized therein for such terminal in the Municipality of San Juan as may be determined by the said Executive Council to its terminal on the Playa of Ponce on a route from Ponce to be determined by the said Executive Council in accordance with the conditions in said ordinance contained, and in accordance with the plans and specifications therefor approved, as in said ordinance provided, and within the said period of three (3) years from the date of the acceptance by it of the said ordinance, shall also complete and have in operation the entire power plant and transmission lines necessary for operation the said entire line of railway, in accordance with the conditions therein contained, and in accordance with the plans and specifications therefor approved as therein provided; and shall duly perform within the said period of three (3) years, all other terms and conditions in said ordinance required to be performed by the Principal within the said period; and shall pay to the obligee any loss or damage accruing against the said obligee by reason of the construction of the works in said ordinance authorized at any time during the period of construction therein limited and before the completion of said work shall have been certified by the Commissioner of the Interior, as in Section 35 of said ordinance provided,—then this obligation shall be void, otherwise to remain in full force and effect.

PROVIDED, HOWEVER, AND UPON THE FOLLOWING EXPRESS CONDITIONS:

First: That no extension of the time or times limited in said ordinance for the completion of the work

therein authorized or any part thereof, whether granted with or without the knowledge and consent of the Sureties, shall in any way discharge the Sureties from liability upon this bond; and,

Second: That no suit, action or proceeding shall be brought or instituted against the Sureties after the period of five (5) years from the date hereof upon or by reason of any default on the part of the Principal in the performance of any of the terms, covenants or conditions of this bond. But all extensions of time granted under the term of the franchise shall be added to the term of five (5) years, so that the life of the bond shall be kept in full force for the five (5) years, and so much additional time as shall be covered by the extension granted.

SIGNED AND SEALED, this 23rd day of May, nineteen hundred and three.

VANDEGRIFT CONSTRUCTION COMPANY,

By J. A. Vandegrift,

(SEAL of Vandegrift
Construction Company.)

Prest.

Attest:

Herbert A. Clarke,
Sec.

THE UNION SURETY & GUARANTY COMPANY,

By Eugene van Schaick,
Chairman.

Attest: W. S. MacKellar,
Secretary.

THE TITLE GUARANTY AND TRUST COMPANY,
of Scranton, Pennsylvania.

By Edwin B. Hay,
Resident Vice-President.

Attest: Geo. T. Parker,
Resident Agent.

(Seal of The Union)	(Seal of The Title Guaranty)
(Surety & Guaranty)	(and Trust Company of
(Company.)	(Scranton, Pennsylvania.)

STATE, CITY AND COUNTY } ss.:
 OF NEW YORK,

On this 27th day of May, A. D. 1903, before me personally appeared EUGENE VAN SCHAICK, to me known, who being by me duly sworn, did depose and say: That he resided in New York City, N. Y., that he is the Chairman of THE UNION SURETY AND GUARANTY COMPANY, the corporation described in and who executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

And the said Eugene Van Schaick further said, that he was acquainted with W. S. MacKELLAR, and knew him to be the Secretary of the said Corporation; that the signature of the said W. S. MacKellar subscribed to said instrument is in the genuine handwriting of said W. S. MacKellar, and was thereto subscribed by the like order of said Board of Directors and in the presence of him, the said Eugene Van Schaick.

HENRY S. MANSFIELD,
Notary Public,
 New York County.

(SEAL)

At a regular meeting of the Board of Directors of The Union Surety and Guaranty Company, held at its office in the City of New York, State of New York, on the 23d day of June, 1899, the following resolution was adopted.

"Resolved, That the President or the Chairman of the Executive Committee be, and they hereby are, and each one of them is authorized and empowered to execute and deliver and attach the seal of the Company to any and all bonds and undertakings for or on behalf of

the Company in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the Secretary, or one of the Assistant Secretaries."

I, W. S. MacKELLAR, Secretary of the Union Surety and Guaranty Company, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said Company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the Company at the City of New York, this 27th day of May, 1903.

W. S. MacKELLAR,
Secretary.

(SEAL)

THE UNION SURETY & GUARANTY COMPANY.

On the Thirty-first day of December, 1902, the Assets and Liabilities of the Company were:

ASSETS.

Real Estate and Improvements.....	\$73,516.20
Bonds and Mortgages	154,516.41
Stocks	1,715.00
Loans secured by collateral	274,762.19
Cash in Banks and Offices	33,273.33
Premiums in course of collection.....	25,618.02
Accrued Interest and Rent	9,425.05
	<hr/>
	\$572,826.21

LIABILITIES.

Premium Reserve Requirement	\$66,203.84	
Undivided Profits	61,026.20	
		\$127,230.04
Due Depositors		195,596.17
Capital Stock		250,000.00
		<u>\$572,826.21</u>

STATE, CITY AND COUNTY } ss.:
OF NEW YORK,

W. S. MACKELLAR, being duly sworn, says that he is the Secretary of the UNION SURETY AND GUARANTY COMPANY, that the foregoing financial statement of the said company is true to the best of his knowledge and belief.

Sworn to before me, this }
27th day of May, A. D. } W. S. MACKELLAR.
1903.

HENRY S. MANSFIELD,
Notary Public,
(SEAL) New York County.

WHEREAS, THE UNION SURETY AND GUARANTY COMPANY, a corporation duly incorporated under the laws of the State of Pennsylvania, has deposited with me its charter or articles of incorporation and the statement required by Section 3 of an Act of Congress approved August 13, 1894, entitled "An Act Relative to recognizances, stipulations, bonds, and undertakings, and to allow certain corporations to be accepted as surety thereon;" and has satisfied me that it has authority under its charter to do the business provided

for in said act, that it has a paid-up capital of not less than \$250,000 in cash or its equivalent, and that it is able to keep and perform its contracts;

Now, THEREFORE, the said THE UNION SURETY AND GUARANTY COMPANY is hereby granted authority to do business under said act in the said State of Pennsylvania, and is also granted authority to do business under said act beyond the limits of said State in any Judicial District of the United States in which it shall first have appointed an agent conformably to the provisions of Section 2 of said act.

JAS. E. BOYD,
Acting Attorney-General.

(Seal)
Department of Justice,
Washington, D. C.,
July 18, 1899.

DEPARTMENT OF JUSTICE,
Washington, D. C.,
January 12, 1903.

The annexed is a true copy of an original authorization to do business, issued by the Attorney-General under the Act of Congress approved August 13, 1894.

Witness my hand and the seal of the Department.

(Seal)
CECIL CLAY,
Chief Clerk.

WHEREAS, THE TITLE GUARANTY AND TRUST COMPANY OF SCRANTON, PENNSYLVANIA, a corporation duly incorporated under the laws of the State of Pennsylvania, has deposited with me its charter or articles of incorporation and the statement required by Section 3 of an Act of Congress approved August 13, 1894, and entitled "An Act Relative to recognizances, stipula-

tions, bonds, and undertakings, and to allow certain corporations to be accepted as surety thereon;" and has satisfied me that it has authority under its charter to do the business provided for in said act, that it has a paid-up capital of not less than \$250,000 in cash or its equivalent, and that it is able to keep and perform its contracts:

Now, THEREFORE, the said TITLE GUARANTY AND TRUST COMPANY OF SCRANTON, PENNSYLVANIA, is hereby granted authority to do business under said act in said State of Pennsylvania, and is also granted authority to do business under said act beyond the limits of said State in any Judicial District of the United States in which it shall first have appointed an agent conformably to the provisions of Section 2 of said act.

P. C. KNOX,
Attorney-General.

Department of Justice,
Washington, D. C.,
November 8, 1902.

(Department
Seal)

DEPARTMENT OF JUSTICE,

Washington, D. C.,

May 12, 1903.

The annexed is a true copy of an original authorization to do business, issued by the Attorney-General, under the Act of Congress approved August 13, 1894.

Witness my hand and the seal of the Department.

CECIL CLAY,
Chief Clerk.

(Seal)

STATEMENT
OF
THE TITLE GUARANTY AND TRUST COMPANY
OF SCRANTON, PENNA.

At close of business, April 1st, 1903.

RESOURCES:

Cash on hand and in banks.....	\$ 187,451.45
Loans, time and demand.....	701,005.34
Bonds and Stocks.....	910,020.00
Mortgages	180,933.48
Real Estate.....	72,337.72
	<hr/>
	\$2,051,747.99

LIABILITIES:

Capital Stock	\$ 750,000.00
Surplus	250,000.00
Undivided Profits	55,564.30
Deposits	996,183.69
	<hr/>
	\$2,051,747.99

COMMONWEALTH OF PENNSYLVANIA, } ss.:
COUNTY OF LACKAWANNA,

F. L. Phillips, Third Vice-President, and J. H. Law, Assistant Secretary of The Title Guaranty and Trust Company, of Scranton, Penna., being duly sworn, say that the foregoing statement is true and correct.

F. L. PHILLIPS,
J. H. LAW.

Sworn and subscribed before me this 25th day of April, A. D. 1903.

E. L. CLARKE,
Notary Public.

(Seal)

Commission expires January 15, 1905.

POWER OF ATTORNEY.

KNOW ALL MEN BY THESE PRESENTS:

That, The Title Guaranty & Trust Company, of Scranton, Penna., a corporation of the Commonwealth of Pennsylvania, doth hereby constitute and appoint Edwin B. Hay, George T. Parker and Clarence S. Parker, all of the City of Washington, District of Columbia, United States of America, to be its true and lawful attorneys in and for the District of Columbia, for the following purposes, to wit:

That any two of the above named parties may execute jointly for and on behalf of the said The Title Guaranty & Trust Company of Scranton, Penna., any and all bonds and undertakings issued in the course of its business, guaranteeing the fidelity of persons holding places of public or private trust; or guaranteeing the performance of contracts, other than insurance policies; or guaranteeing bonds, or undertakings required or permitted in estates or in actions or proceedings at law, or bonds authorized by law; and any such bond so executed shall be binding upon the said company to all intents and purposes as fully as if done by the regular officers of the company in their own proper persons in its behalf.

IN WITNESS WHEREOF, The said The Title Guaranty & Trust Company, of Scranton, Penna., pursuant to a resolution of its Board of Directors duly passed on the seventh day of February, A. D. 1903 (a certified copy of which is hereto annexed), has caused these presents to be sealed with its common and corporate seal, duly attested by its Third Vice-President and by its Assistant Secretary this fifteenth day of May, A. D. 1903.

**THE TITLE GUARANTY & TRUST
COMPANY, OF SCRANTON, PENNA.**

**By F. L. PHILLIPS,
Third Vice-President.**

Attest:

**J. H. LAW,
(Seal) Assistant Secretary.**

COMMONWEALTH OF PENNSYLVANIA, } ss.:
 COUNTY OF LACKAWANNA,

On this fifteenth day of May, A. D. 1903, before me, F. L. Phillips, Third Vice-President of The Title Guaranty & Trust Company, of Scranton, Penna., with whom I am personally acquainted, who being by me duly sworn, says that he is Third Vice-President of The Title Guaranty & Trust Company, of Scranton, Penna.; that he knows the corporate seal of the company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the Board of Directors of said company; that he signed said instrument as Third Vice-President of said company by like authority. The said F. L. Phillips further says that he is acquainted with J. H. Law, and knows him to be the Assistant Secretary of the said The Title Guaranty & Trust Company, of Scranton, Penna.; that the signature of the said J. H. Law subscribed to the said instrument is the genuine handwriting of the said J. H. Law and was thereto subscribed by like order of the said Board of Directors.

E. L. CLARKE,
Notary Public.

(Seal)

Commission expires Jan. 15, 1905.

COPY OF RESOLUTION.

On motion duly seconded, the following resolution was unanimously adopted:

RESOLVED, That the President or the Third Vice-President, and the Secretary or Assistant Secretary, be and they are hereby authorized to appoint one or more persons residing in the District of Columbia, United States of America, who shall have power to execute for and on behalf of the company any and all bonds and undertakings issued in the course of its business, guaranteeing the fidelity of the persons holding

places of public or private trust; or guaranteeing the performance of contracts, other than insurance policies; or guaranteeing bonds, or undertakings required or permitted in estates or in actions or proceedings at law, or bonds authorized by law; and any such bonds so executed shall be binding upon the said company to all intents and purposes as fully as if done by the regular officers of the company in their own proper persons in its behalf, and the President or Third Vice-President, and Secretary or Assistant Secretary, are hereby authorized to execute a power of attorney making such appointment and qualifying the appointee for the purposes named.

I, J. H. Law, Assistant Secretary of The Title Guaranty & Trust Company, of Scranton, Penna., do hereby certify that the above and foregoing is a full and correct copy of a resolution passed by the Board of Directors of the said company at a regular meeting thereof, duly called and held on the seventh day of February, A. D. 1903, a quorum being present, as the same appears on the records of the company now in my possession and custody as Assistant Secretary.

In witness whereof I have hereunto set my hand and affixed the seal of the said company, at the City of Scranton, Pennsylvania, this fifteenth day of May, A. D. 1903.

(Seal)

J. H. LAW,
Assistant Secretary.

(Endorsed: San Juan, June 4, 1903. The within bond of the Vandegrift Construction Company to the People of Porto Rico dated May 23, 1903, is satisfactory in form to me. [Signed] Frank Feuille, Acting Attorney-General. San Juan, June 4, 1903. The within bond is satisfactory as to sufficiency to me. [Signed] William F. Willoughby, Treasurer of Porto Rico. [Signed] Wm. J. Hand, Atty. for Plff.)

"EXHIBIT C."

AN ORDINANCE AMENDING "AN ORDINANCE GRANTING TO THE VAN-DEGRIFT CONSTRUCTION COMPANY, THE RIGHT TO BUILD AND OPERATE A LINE OF RAILWAY BETWEEN THE MUNICIPALITY OF SAN JUAN AND THE PLAYA OF PONCE IN THE ISLAND OF PORTO RICO, AND TO DEVELOP ELECTRIC ENERGY BY WATER OR OTHER POWER FOR DISTRIBUTION AND SALE FOR RAILWAY, LIGHTING AND INDUSTRIAL PURPOSES."

Be it ordained and enacted by the Executive Council of Porto Rico:

SECTION 1.—Section 1 of "An ordinance granting to the Vandegrift Construction Company, the right to build and operate a line of railway between the municipality of San Juan and the Playa of Ponce in the Island of Porto Rico, and to develop electric energy by water or other power for distribution and sale for railway, lighting and industrial purposes," heretofore enacted by the Executive Council of Porto Rico and approved by the Governor of Porto Rico on the 3rd day of March, 1903, and by the President of the United States on the 21st day of March, 1903, is hereby amended by striking out all of that part of Section 1 of said Ordinance beginning with the commencement of line 23 on page 2 thereof and continuing to and including the word "Council" in line 27 on page 2 of said Ordinance.

SECTION 2.—Section 15 of said Ordinance is hereby amended so as to hereafter read as follows:

"SECTION 15.—Before the first day of January, 1905, the grantee herein shall cause the road-bed of

1 said railway to be completely graded between the
2 Island of San Juan and the urban portion of the
3 municipality of Caguas, and such number of men
4 shall be employed in the prosecution of said work as
5 shall be necessary to complete the same on or before
6 the said first day of January, 1905; Provided, that the
7 number of men to be actually employed and engaged
8 in the construction of said road on or before the
9 Seventh day of August, 1904, shall not be less than
10 250; and Provided further, that the number of men
11 engaged in the work of construction shall be increased
12 beyond the number of 250 and up to the number of
13 500 men, or approximately that number, it being the
14 intent and purpose of this ordinance to provide that
15 as many men shall be engaged in said construction
16 work within the dates specified, as are necessary to
17 complete the same, without employing a larger force
18 than can be advantageously engaged in said work;
19 and Provided further, that all employees, workmen,
20 or laborers engaged in the construction of said work
21 shall be paid weekly on such pay day as the grantee
22 herein may select; and Provided further, that this
23 extension of time wherein to finish the construction
24 Work in this amendment described, is made with the
25 express understanding that upon a failure of the
26 grantee to comply with the terms and conditions
27 herein set forth, the franchise granted to the Van-

degrift Construction Company, approved by the Governor of Porto Rico on the 3rd of March, 1903, may, at the option of the Executive Council of Porto Rico, be subject to immediate forfeiture. And the grantee hereof shall also cause the foundations and approaches of its proposed bridge across the body of water flowing through the Boqueron into the harbor of San Juan to be completed, and shall have contracted for the material necessary for the superstructure of such bridge before the said first day of January, 1905."

SECTION 3.—Section 18 of said Ordinance is hereby amended by striking out of said Section the words "within one year from the date of the acceptance hereof as herein provided," appearing in lines 22 and 23 on page 9 of said Ordinance, and substituting therefor the words "before the first day of January, 1905," and the said Section is further amended by striking out the words "within the same period" appearing in line 24 on page 9 of said Ordinance and substituting therefor the words "before the first day of January, 1905."

SECTION 4.—Section 30 of the said Ordinance is hereby amended by adding the words "with the approval of the Governor of Porto Rico and of the President of the United States, and such amendment, alteration or repeal shall also be subject to the power of Congress to annul or modify the same," after the word "Council" appearing in line 15 of page 18 of said Ordinance.

SECTION 5.—This Ordinance when approved by the Governor

- 1 and by the President, shall take effect immediately upon the
- 2 acceptance by the grantee of the terms and conditions hereof
- 3 as above provided.

Done in open session of the Executive Council of Porto Rico on this the seventh day of July in the year of our Lord nineteen hundred and four.

(Signed) CHAS. HARTZELL,
President of the Executive Council.

Approved this the 18th day of July, A. D., 1904.

(Signed) BEEKMAN WINTHROP,
Governor of Porto Rico.

Approved this the second day of August, A. D., 1904.

(Signed) THEODORE ROOSEVELT,
President of the United States.

THE PEOPLE OF PORTO RICO.

OFFICE OF THE SECRETARY.

San Juan, October 15, 1906.

I, REGIS H. POST, Secretary of Porto Rico,

do hereby certify that the foregoing four printed pages are a true copy of an ordinance entitled "An ordinance amending an ordinance granting to the Vandegrift Construction Company, the right to build and operate a line of railway between the municipality of San Juan and the Playa of Ponce in the Island of Porto Rico, and to develop electric energy by water or other power for distribution and sale for railway, lighting and industrial purposes" as the said ordinance appears upon the official record in my custody of the proceedings of the Executive Council of Porto Rico at a meeting held on the Seventh day of July, A. D. 1904. I further certify that the said ordinance was duly approved by the Governor of Porto Rico on the Eighteenth day of July, A. D., 1904, as appears by the official records in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and the great seal of Porto Rico, at the Capital, on this fifteenth day of October, in the year of our Lord nineteen hundred and six, and of the Independence of the United States the one hundred and thirty-first.

REGIS H. POST,

Secretary of Porto Rico.

"EXHIBIT D."

AN ORDINANCE REPEALING "AN ORDINANCE GRANTING TO THE VANDEGRIFT CONSTRUCTION COMPANY, THE RIGHT TO BUILD AND OPERATE A LINE OF RAILWAY BETWEEN THE MUNICIPALITY OF SAN JUAN AND THE PLAYA OF PONCE IN THE ISLAND OF PORTO RICO, AND TO DEVELOP ELECTRIC ENERGY BY WATER OR OTHER POWER FOR DISTRIBUTION AND SALE FOR RAILWAY, LIGHTING AND INDUSTRIAL PURPOSES.

1 WHEREAS, the Executive Council of Porto Rico granted
2 to the Vandegrift Construction Company a franchise, privilege
3 or concession, as above entitled, under the terms of which the
4 said Vandegrift Construction Company was authorized and
5 empowered to construct, maintain and operate a railway in
6 Porto Rico for the conveyance of persons and property for hire
7 from the Municipality of San Juan to the Playa of Ponce, and
8 through intermediate points, which ordinance was approved by
9 the Governor of Porto Rico on the 3rd day of March, 1903, and
10 by the President of the United States on the 21st day of
11 March, 1903; and

12 WHEREAS, the said ordinance was duly accepted by the
13 said grantee on the 24th day of April, 1903; and

14 WHEREAS, Section 15 of the said ordinance provided that
15 within one year from the date of the acceptance of the said
16 franchise, together with the terms and conditions thereof, the
17 grantee should cause the roadbed of said railway to be com-
18 pletely graded between the island of San Juan and the urban
19 portion of the municipality of Caguas; and should also cause

1 the foundations of its proposed bridge across the body of water
2 through the Boqueron into the harbor of San Juan to be com-
3 pleted, and should have contracted for the material necessary
4 for the superstructure of said bridge; and

5 WHEREAS under the requirements of Section 18 of said
6 ordinance, and its acceptance thereof by the grantee, the
7 grantee agreed to build within one year from the date of the
8 acceptance of said ordinance a power dam at Comerio Falls; and

9 WHEREAS the said grantee failed to do and perform the
10 work and labor required by Section 15 of said ordinance within
11 the time specified therein; or to construct the power dam at
12 Comerio Falls as the said grantee was required to construct
13 the same by said Section 18; or to do or perform the work
14 and labor specified in Sections 15 and 18 of said ordinance as
15 by said Sections the said grantee was required to do; and

16 WHEREAS because of the failure of said grantee to do
17 and perform the work and labor set forth and specified in said
18 Section 15 of said ordinance in accordance with the terms thereof,
19 the Executive Council amended said franchise upon the petition
20 of said grantee or its assignee, the Porto Rico Railway, Light
21 and Power Company, by the terms of which amendment the
22 time in which to do and perform the work and labor specified
23 in Section 15 of said ordinance was extended until the 1st day
24 of January, 1905, and that the said amendment to said franchise
25 being substantially a substitute for Section 15 of the original
26 grant contained the following proviso: "and provided further,
27 that this extension of time wherein to finish the construction

1 work in this amendment described, is made with the express
2 understanding that upon a failure of the grantee to comply
3 with the terms and conditions herein set forth, the franchise
4 granted to the Vandegrift Construction Company, approved by
5 the Governor of Porto Rico on the 3rd day of March, 1903,
6 may, at the option of the Executive Council of Porto Rico, be
7 subject to immediate forfeiture," said franchise as amended
8 was approved by the Governor of Porto Rico on the 18th day
9 of July, 1904, and by the President of the United States on
10 the 2nd day of August, 1904; and

11 WHEREAS the said grantee, the Vandegrift Construction
12 Company, or its assignee, the Porto Rico Railway, Light and
13 Power Company, has failed to do and perform the work and
14 labor called for by Section 15 of said ordinance as amended,
15 and as by the acceptance of said amended franchise the said
16 grantee or its assignee, the Porto Rico Railway, Light and
17 Power Company, promised and agreed to do; and

18 WHEREAS the said grantee or its assignee, the Porto Rico
19 Railway, Light and Power Company, has in every respect
20 failed to do and perform the work and labor required by
21 Section 18 of said franchise; and

22 WHEREAS by the terms and conditions of said grant as the
23 same was passed by the Executive Council of Porto Rico, and
24 approved by the Governor of Porto Rico, and by the President
25 of the United States, and accepted by the said grantee, the
26 said franchise, privilege or concession, and all of the rights,
27 grants, or privileges thereunder or appertaining thereto, have

been, and now are, at the option of the Executive Council of Porto Rico, subject to revocation, forfeiture or repeal;

Now, Therefore, be it enacted by the Executive Council of Porto Rico:—

Section 1.—That the Ordinance entitled “An Ordinance granting to the Vandegrift Construction Company the right to build and operate a line of railway between the Municipality of San Juan and the Playa of Ponce in the Island of Porto Rico, and to develop electric energy by water or other power for distribution and sale for railway, lighting and industrial purposes,” approved by the Governor of Porto Rico on the 3rd day of March, 1903, and by the President of the United States on the 21st day of March, 1903, and any or all amendments thereto, be and the same are hereby repealed, the said ordinance and the amendments thereto having been by the said grantee in all respects violated, and especially the provisions and requirements of Section 18 of said franchise, and said grantee having failed to comply with Section 15 of said franchise as amended, each of said provisions being vital to the life of said grant; all of the rights, privileges or concessions appertaining or appurtenant thereto, are hereby revoked and forfeited to The People of Porto Rico as provided in Section 15 as amended, and under the general provisions of Section 30 of said ordinance.

Section 2.—All sureties or obligations of whatsoever character or kind heretofore given by the said grantee as a guaranty of the faithful performance of the obligations and

- 1 conditions set forth in said ordinance are hereby declared for-
- 2 feited to The People of Porto Rico to all and whatsoever exten
- 3 the same shall be liable under the law.

Done in open session of the Executive Council held at San Juan in the Island of Porto Rico, on this 24th day of February, A. D. 1905.

(Signed) RÉGIS H. POST,
President of the Executive Council.

Approved this the 18th day of March, A. D., 1905.

(Signed) BEEKMAN WINTHROP,
Governor of Porto Rico.

Approved this the twelfth day of May, A. D., 1905.

(Signed) THEODORE ROOSEVELT,
President of the United States.

THE PEOPLE OF PORTO RICO.

OFFICE OF THE SECRETARY.

San Juan, October 15, 1906.

I, Régis H. Post, Secretary of Porto

Rico, do hereby certify that the foregoing five printed pages are a true copy of an ordinance entitled "An Ordinance repealing 'An Ordinance granting to the Vandegrift Construction Company, the right to build and operate a line of Railway between the Municipality of San Juan and the Playa of Ponce in the Island of Porto Rico, and to develop electric energy by water or other power for distribution and sale for Railway, Lighting and Industrial Purposes'," as the said ordinance appears upon the official record in my custody of the proceedings of the Executive Council of Porto Rico at a meeting held on the 24th day of February, A. D., 1905. I further certify that the said ordinance was duly approved by the Governor of Porto Rico on the 18th day of March, A. D., 1905, as appears by the official records in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and the great seal of Porto Rico, at the Capitol, on this 15th day of October in the year of our Lord nineteen hundred and six, and of the Independence of the United States the one hundred and thirty-first.

RÉGIS H. POST,

Secretary of Porto Rico.

(Seal of)
(Porto Rico)

(Endorsed: No. 66. October Sessions 1906. The People of Porto Rico v. The Title Guaranty and Surety Company. Plaintiff's Statement. Filed Dec. 13, 1906. E. R. W. Searle, Clerk. Wm. J. Hand, Frank Feuille, Atty. Gen. pro Plaintiff.)

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA.

No. 66. Oct. Sessions, 1903.

The People of Porto Rico

v.

The Title Guaranty and Surety Company.

DEMURRER.

Now comes said defendant and demurs to the declaration filed in said case, and says that the same is not sufficient in law, and for causes of demurrer now here shows unto the Court:

First.—There is no allegation that the defendant company had qualified under the law to transact business in the Island of Porto Rico, it being a foreign corporation under the provisions of the Act of January 31st, 1901, Section 353, Political Code, and in the absence of such averment, it had no legal existence in said island, and any contract or alleged contract it may have entered into is null and void, and no court will lend its aid to the enforcement of such an illegal act.

Second.—There is no averment that the ordinance of the Executive Council of Porto Rico, passed on the third of March, 1903, (attached to plaintiff's declaration and marked "Exhibit A.") granting to the Vandergrift Construction Company the right to build and operate a line of railway, etc., was reported to Congress as required by the 32nd Section of the Act of Congress creating a civil government for Porto Rico, approved April 20th, 1900.

Third.—There is no averment that the conditions precedent to the carrying into effect of the provisions of the said ordinance of March 3rd, 1903 (Exhibit A.)

between the government of Porto Rico and the Vandergrift Construction Company were ever entered into in accordance therewith, and in accordance with the laws governing and controlling the matter.

Fourth.—The said ordinance of March 3rd, 1903, provides in Section 30, as follows:

"The term grantee as herein used shall be held to extend to and include the Vandergrift Construction Company and its successors and assigns; and in case of the transfer by the grantee either by its own act or by act of law of the property and property rights acquired hereunder, the purchaser or assignee shall be bound by all the terms hereof of every name and nature. . . . It is further expressly understood that the privileges, franchises and concessions granted under this ordinance, and all rights and benefits accruing thereunder and all property interests and rights connected therewith may be assigned, sold, transferred or set over to the Porto Rico Railway, Light and Power Company, a corporation about to be organized for the purpose; but no other assignment thereof shall be valid until approved by the Executive Council."

The declaration alleges an assignment to the Porto Rico Railway, Light and Power Company, as was contemplated and provided for in said ordinance, and the railway company commenced the construction of the works authorized by the said ordinance (such an assignment having been provided for and authorized by the said ordinance) and the assignee having been recognized as the holder of said franchises, privileges and rights granted therein, and the party to exercise and enjoy the same, no right of action exists as against the principal or surety on the bond of the Vandergrift Construction Company and The Title Guaranty and Surety Company for any failure on the part of the Porto Rico Railway, Light and Power Com-

pany to comply with the terms and provisions of the said ordinance; and the acceptance by the Executive Council of the Government of Porto Rico of the alleged assignee of the Vandergrift Construction Company as the holders of the franchises and rights, concessions, etc., granted by said ordinance, operated in law as a release to the Vandergrift Construction Company and its surety upon the bond recited in the declaration as having been given to the Executive Council prior to the commencement of the work upon said railroad and prior to the assignment as alleged to the said Porto Rico Railway, Light and Power Company, and prior to the enjoyment of any of the rights, privileges, concessions, etc., of said ordinance.

Fifth.—Said declaration is not sufficient in law because it does not set out the execution of the bond upon which the action is based, either by the executive officials or others, in pursuance of authority conferred upon him or them, by an instrument of equal dignity with the bond, and in such manner as is required to make the bond the obligation of the defendant.

Sixth.—There is no averment in the declaration that the bond was approved in the certain and particular manner provided by the ordinance of March 3rd, 1902, to make it fully binding upon the obligors, and a valid contract.

Seventh.—It is alleged and charged in said declaration that the said Porto Rico Railway, Light and Power Company failed to comply with and broke the condition of said ordinance and bond. Whereas, said bond is conditioned that if the principal, the Vandergrift Construction Company, fully completed the work authorized by said ordinance within three years, etc., in accordance with the conditions contained in the ordinance, etc., and performs other conditions therein expressed, etc., and the breaches charged are charged

to be committed and done by the Porto Rico Railway, Light and Power Company. For this no liability arises on the part of this defendant in view of the provisions of the said ordinance, nor can any such liability be read into the bond it is alleged to have given for and on behalf of the Vandergrift Construction Company.

Eighth.—There is no averment that this defendant ever undertook to obligate itself as surety for or on behalf or on account of the Porto Rico Railway, Light and Power Company, or that it ever had any contract with said company, or that it ever agreed with the Government of Porto Rico, directly or indirectly, to act as surety for said railway company, or that it ever had any knowledge of or ever consented to the assignment of the Vandergrift Construction Company to the Porto Rico Railway, Light and Power Company of the concessions, grants, franchises, privileges, etc., which the said ordinance of March 3rd, 1902, contained, and it is evident that the Government of Porto Rico, acting through its Executive Council, substituted the Porto Rico Railway, Light and Power Company, as in and by the provisions of said ordinance they had agreed to do, as the grantee, in the place and stead of the Vandergrift Construction Company as the owner of the grants, franchises, concessions, etc., in said ordinance contained, and the sole party to have, enjoy and exercise the same, and to comply with the provisions in said ordinance contained on the part of the grantee.

Ninth.—If the Porto Rico Railway, Light and Power Company is in default, as alleged in said declaration, and a subsequent extension was granted it, no cause of action arises against the bond of the Vandergrift Construction Company. The averment in the declaration that the principal and its assignee were in default, under the terms of said ordinance and bond, is ineffective and null and void, because it is averred

elsewhere in said declaration that the breaches of this bond were done and committed by another corporation than the Vandergrift Construction Company, to wit, the Porto Rico Railway, Light and Power Company, exclusively, and that it commenced the construction of the work authorized by the ordinance and proceeded therewith. There was, therefore, a recognition on the part of the Government of Porto Rico of the Porto Rico Railway, Light and Power Company as the grantee of the concessions and privileges in said ordinance contained, and the sole owner thereof prior to the execution of any work thereunder, or the incurring of any obligation on the part of the Vandergrift Construction Company in connection therewith, or this defendant.

Tenth.—It is charged in the said declaration that neither the Vandergrift Construction Company, nor its assignee, complied with the conditions and requirements of the said original ordinance as so amended, but broke the condition of the said bond in that it failed "to cause the said roadbed of the said railway to be completely graded, etc." "It" must necessarily mean the Porto Rico Railway, Light and Power Company, and it constitutes no breach of the bond if this company "failed to cause the roadbed of said railway to be completely graded between the Island of San Juan and the urban portion of the municipality of Caguas, etc."

Eleventh.—No stipulation could be inserted in the amended ordinance changing the character of the original, without relieving the surety upon the bond covering the original ordinance, except a mere extension of time. The declaration alleges: "Whereupon, in accordance with the right reserved in the said original ordinance and expressly stipulated in the said amended ordinance, the Executive Council did decide, etc." The amended ordinance contains other and different provisions with reference to the enjoyment of the fran-

chises, concessions, etc., and the contract relations between the Government of Porto Rico and the grantee in the original ordinance, aside from the matter of extension of time, and, therefore, the surety upon the bond in this case is relieved as a matter of law.

Twelfth.—There is no sufficient recital and legal statement in the declaration of the assignment by the Vandergrift Construction Company to the Porto Rico Railway, Light and Power Company. If the same is in writing, as in contemplation of law it must have been, the date of the assignment must be given, the manner in which the same was given must be set out to make it appear that it was legally done, and the mere averment that the Vandergrift Construction Company assigned the rights and franchises granted by said ordinance to the Porto Rico Railway, Light and Power Company, is insufficient. Such a transfer could not legally be made except by properly executed deed on the part of the Vandergrift Construction Company.

Thirteenth.—The condition of the bond in this case discloses a cause of action, if any, in the nature of a penalty, and in the absence of any loss or damage accruing against the obligee, and the assertion of any such, the action falls.

Fourteenth.—The sum named in the bond in this case is in the nature of a penalty and not liquidated damages, as appears by the conditions of the bond. It did not become forfeited therefore, and the liability of the defendant is not, as fixed by the plaintiff, the sum of one hundred thousand dollars, because of the facts alleged in plaintiff's declaration. The damages contemplated by the conditions in the said bond depend upon extrinsic circumstances, and they must be actual and alleged in the declaration.

Fifteenth.—Section 35 of the ordinance provides as follows, to wit:

“Upon the presentation of the certificate of the Commissioner of the Interior showing the completion of the work therein authorized, and upon the full compliance with the terms of this ordinance to the satisfaction of the Executive Council, and upon the full payment by the grantee of any loss, damage or costs accruing against the People of Porto Rico, as in said bond provided, said bond shall be cancelled and returned to the grantee.”

The penalty of the bond and the penal sum named therein, therefore, applies as much to the clause “and shall pay to the obligee any loss or damage accruing against the said obligee by reason of the construction of the works in said ordinance authorized, at any time during the period of the construction therein limited . . . as in Section 35 provided,” as much as to the other conditions therein; that is to say, the penalty on the bond and the penal sum named therein applies to the second condition as well as to the first, and the former cannot be eliminated by any rule of construction.

Sixteenth.—There is no averment that the Vandergrift Construction Company ever had any relation in any way with the grants, franchises and concessions and privileges of the said ordinance of March 3rd, 1903, contained and conferred, other than as the medium for the transfer to the Porto Rico Railway, Light and Power Company, which, under the plain terms of the ordinance, it expressly had the right to transfer, and the Executive Council of Porto Rico, thereafter, as appears by the declaration, recognized the Porto Rico Railway, Light and Power Company as the grantee of said privileges, franchises, etc., and thereafter amended the ordinance in important particulars other than in the matter of extension of time; and therefore the People of Porto Rico have no cause of action against this defendant arising out of said bond.

Seventeenth.—Under the law the Government of Porto Rico would have no right to proceed against the surety for loss or damage, none being alleged, unless the measure of it had been first adjudged by the Commissioner of the Interior for the Island of Porto Rico, and there is no allegation of any such fact.

Eighteenth.—The penal sum named being in the nature of a penalty and not as liquidated damages, no cause of action arises because of any or all the facts alleged in the declaration.

Nineteenth.—The changes made in the original ordinance, by the amendment thereto, enacted by the Executive Council of the Government of Porto Rico, without the knowledge or acquiescence of the defendant company therein and thereto, so far changed the character of the undertaking as to release the surety upon the bond in this case, and relieved this defendant from all liability thereon.

WILLARD, WARREN & KNAPP,
Attorney for Defendant.

January 10, 1907.

(Endorsed: U. S. Circuit Court, Middle District of Penna. No. 66. October Sessions, 1906. The People of Porto Rico v. The Title Guaranty and Surety Company. Demurrer.)

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA.

No. 66. Oct. Sessions, 1906.

The People of Porto Rico
v.
The Title Guaranty and Surety Company.

To the Honorable Judge of said Court:

The People of Porto Rico, plaintiff, by its attorney, William J. Hand, Esq., respectfully prays the Court for leave to amend its statement of cause of action heretofore filed in the above-entitled action on December 13, 1906, as follows:

First.—By substituting the word “they” for the word “it” appearing on page 5, line 11, of the original statement in the phrase “in that it failed to cause the road-bed of said railway to be completely graded,” etc.

Second.—By striking out the following words appearing in the last paragraph of the original statement on page 6, lines 24 to 30, to wit: “the default and failure of the principal in said bond to perform the conditions thereof having caused great and serious damage, being in their nature uncertain, unascertainable with exactness, and not measurable by any exact pecuniary standard, but being dependent upon extrinsic considerations and circumstances, were by the terms of the said bond liquidated at the sum of one hundred thousand dollars.”

A copy of the statement as amended without the exhibits is hereto appended and plaintiff prays that it may be ordered to be filed and substituted for the original statement the copies and exhibits appended to the original statement to be considered as appended to and forming a part of the amended statement.

And your petitioner will ever pray, etc.

THE PEOPLE OF PORTO RICO,
Plaintiff.

By their attorney, WM. J. HAND.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA.

No. 66. Oct. Sessions, 1906.

The People of Porto Rico

v.

The Title Guaranty and Surety Company.

PLAINTIFF'S AMENDED STATEMENT.

The People of Porto Rico, plaintiff, a body politic or corporation, (having governmental powers over the Island of Porto Rico and certain adjacent islands, dependencies of the United States of America) created by and organized under the laws of the United States of America, and deriving all its capacities and powers therefrom, (viz, by and under an Act of Congress entitled, "An Act temporarily to provide revenues, and a civil government for Porto Rico and for other purposes," approved April 12, 1900, and the several acts supplemental and amendatory thereto) by its attorney, William J. Hand, Esq., claims of the Title Guaranty and Surety Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, for the purpose, *inter alia*, of acting "as security for the faithful performance of any contract entered into with any person or municipal or other corporation or with any State or government, by any person or persons, corporation or corporations, and having its domicile and principal place of business in the City of Scranton, Pennsylvania, in said District, the sum of one hundred thousand dollars, which is justly due and payable to the plaintiff by the defendant upon the cause of action whereof the following is a statement:

On the second day of March, A. D. 1903, the Executive Council of Porto Rico, acting under authority

of the power vested in them by the Act of Congress above cited, passed a certain ordinance entitled "An ordinance granting to the Vandergrift Construction Company the right to build and operate a line of railway between the municipality of San Juan and the Playa of Ponce in the Island of Porto Rico, and to develop electric energy by water or other powers for distribution and sale for railway, lighting and industrial purposes," which said ordinance was duly approved by the Governor of Porto Rico, March 3rd, A. D. 1903, and by the President of the United States, March 21st, A. D. 1903, a copy of said ordinance being hereto appended and made a part hereof, marked "Exhibit A." By the terms of said ordinance the said Vandegrift Construction Company was granted certain franchises, privileges, concessions and rights relative to the building and operating of a certain line of railway between certain designated points in said Island of Porto Rico, for the conveyance of persons and property for hire, and the further development of electrical energy by water and other power for distribution and sale for railway, lighting and industrial purposes, subject to the express right of the said Executive Council to amend, alter or repeal the same, and to certain other conditions therein expressed. The said ordinance was duly accepted in writing dated April 24, 1903, by the said Vandegrift Construction Company, and subsequently, in further compliance with the requirements of said ordinance the Vandegrift Construction Company as principal, and the Union Surety and Guaranty Company, and the defendant, whose corporate name was then The Title Guaranty & Trust Company of Scranton, Penna. (being the name under which said defendant was originally incorporated, its name having been subsequently changed to the Title Guaranty & Surety Company), as sureties, duly executed under their seals and delivered to the plaintiff their certain writing obligatory com-

monly called a bond, dated March 23, A. D. 1903 (upon which this action is founded), wherein and whereby they acknowledged themselves and their successors, to be jointly and severally held and firmly bound to pay unto the plaintiff the sum of one hundred thousand dollars, conditioned that if the said principal fully completed the work authorized by said ordinance within three years after its acceptance by the Vandergrift Construction Company, in accordance with the condition contained in said ordinance, and performed other conditions therein expressed, as by reference thereunto being had will fully appear, then said obligation to be void, otherwise to be in full force and effect; it being further expressly stipulated in said bond that no extension of the time or times limited in said ordinance for the completion of the work therein authorized or any part thereof should in anywise discharge the sureties from liability upon said bond; said bond having been executed under defendant's corporate seal and delivered, on behalf of the defendant, by its duly authorized and empowered agents resident in the City of Washington, D. C., a copy of said bond being hereunto appended and made a part hereof, marked "Exhibit B." Said bond after its execution and delivery to plaintiff by the said obligors, was on the 4th day of June, A. D. 1903, duly approved as to its form and sufficiency by the proper officials, as provided in said ordinance, and thereupon became fully binding upon the obligors, including the defendant, said bond having furthermore been formally accepted by the Executive Council of Porto Rico, on June 8, 1903.

Thereafter the Vandegrift Construction Company assigned the rights and franchises granted by said ordinance to Porto Rico Railway, Light and Power Company, as was contemplated and provided for in said ordinance, and said latter company commenced the construction of the works authorized by said ordinance,

but proceeded with the work specified and required to be done so slowly, and with such lack of diligence, that it failed to comply with and broke the conditions of the said ordinance and bond, and was in default in accordance with the terms thereof, in that it had not within one (1) year from the date of acceptance of said ordinance caused the road-bed of the said railway to be completely graded between the Island of San Juan and the urban portion of the municipality of Caguas, and had not caused the approaches and foundations of its proposed bridge across the body of water flowing through the Boqueron into the harbor of San Juan to be completed, nor contracted for the material necessary for the super-structure of said bridge as provided by Section 15 of said ordinance, and further had not caused the power-dam at Comerio Falls to be completed within one (1) year from the date of acceptance of said ordinance, nor had under contract within said period the major part of the electrical apparatus necessary for the transformation of the power to be obtained therefrom into electric energy, as provided by the first part of Section 18 of said ordinance; and the said principal, and its assignee aforesaid, being so in default under the terms of said ordinance and bond, in order to prevent the forfeiture of the said bond and the repeal of the franchises granted by said ordinance, in accordance with the respective provisions thereof, by reason of such default, requested an extension of the time for the completion of the work provided to be done, in Section 15 and 18 of the said original ordinance, within one year from the date of its acceptance; whereupon the Executive Council of Porto Rico, relying upon the authorization for such extension of time granted by the express terms of said bond executed by the Vandegrift Construction Company and its sureties above-named passed on July 7, A. D. 1904, an ordinance amending the above-mentioned original ordinance, and providing

that the time for the completion of the said work upon which default had been made as above stated should be extended until the first day of January, A. D. 1905, upon consideration of the fulfillment of certain conditions, therein expressed, by the grantee under said original ordinance, which said amending ordinance was duly approved by the Governor of Porto Rico on July 18, A. D. 1904, and by the President of the United States on August 2, A. D. 1904, and was duly accepted by the grantee under said original ordinance a copy thereof being hereto appended, and made a part hereof, marked "Exhibit C." Nevertheless, neither the Vandegrift Construction Company, nor its assignee aforesaid, complied with the conditions and requirements of the said original ordinance as so amended, but broke the conditions of the said bond, in that they failed to cause the road-bed of said railway to be completely graded between the Island of San Juan and the urban portion of the municipality of Caguas, and the approaches and foundations of the proposed bridge across the body of water flowing through the Boqueron into the harbor of San Juan to be completed, and failed to contract for the material necessary for the superstructure of said bridge, and failed to complete the power-dam at Comercio Falls, and to have under contract the major part of the electrical apparatus necessary for the transformation of the power to be obtained therefrom into electric energy, before the first day of January, A. D. 1905, as required by Sections 15 and 18 of the original ordinance, as amended, having failed in all respects to substantially comply with any of said conditions and requirements, and having abandoned, prior to said last-mentioned date, all work provided to be done by said ordinance; and thereby failed to comply with the provisions of said bond to the effect that the principal should within three years from the date of the acceptance by it of said ordinance fully complete the work therein an-

thorized in accordance with the conditions therein contained, and should duly perform within the said period of three years all other terms and conditions in said ordinance required to be performed by the principal within said period, the plaintiff having performed on its part all the duties required to be performed by it, or its agents, or officials.

Whereupon, in accordance with the right reserved in the said original ordinance and expressly stipulated in the said amending ordinance, the Executive Council did, because of such default on the part of the Vandegrift Construction Company and its assignee aforesaid, on the 24th day of February, A. D. 1905, pass an ordinance repealing both the said original ordinance and its amendments, and revoking and forfeiting to the people of Porto Rico all the rights, privileges and concessions appertaining to the said franchise granted by said ordinances, and declaring all sureties and obligations therefor given by the Vandegrift Construction Company as a guaranty of the faithful performance of the obligations and conditions set forth in said ordinance forfeited to the People of Porto Rico, which said last recited ordinance was approved by the Governor of Porto Rico on the 18th day of March, A. D. 1905, and by the President of the United States on the 12th day of May, A. D. 1905, a copy whereof is hereto appended and made a part hereof, marked "Exhibit D."

Wherefore, and by reason of the premises, the said bond became forfeited and the liability of the said above-named defendant, jointly and severally with the other obligors named in the said above-recited bond, became absolutely and definitely fixed to pay to the plaintiff the sum of one hundred thousand dollars, and thereby an action has accrued to the plaintiff to demand and have from the defendant the said sum of one hundred thousand dollars, specified in said bond, yet the said defendant, though often requested thereto, has not,

nor has the principal nor the other surety named in the said bond, nor anyone on its or their behalf, paid the said sum or any part thereof but has neglected and refused and still neglects and refuses to pay the same or any part thereof, to the damage of the plaintiff of the sum of one hundred thousand dollars, and therefore the plaintiff brings this suit, etc.

WM. J. HAND,
Attorney for Plaintiff.

AND NOW, November 2, 1908, upon motion of William J. Hand, Esq., attorney for the People of Porto Rico, leave is granted to the plaintiff to amend its statement of cause of action heretofore filed in the manner specified in the foregoing petition, and the amended statement appended to the said petition, is hereby ordered to be filed and substituted for the original statement. The copies and exhibits appended to the original statement to be considered as appended to and forming a part of the amended statement.

R. W. ARCHBALD,
Dist. Judge.

(Endorsed: No. 66. October Sessions, 1908. The People of Porto Rico v. The Title Guaranty and Surety Company. Petition and Amended Statement and Order of Court. Filed Nov. 2, 1908. E. R. W. Searle, Clerk. Alfred Hand, William J. Hand, Attorneys and Counselors, Commonwealth Building, Scranton, Pa.)

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA.

No. 66. Oct. Sessions, 1906.

The People of Porto Rico

v.

The Title Guaranty and Surety Company.

Now, November 2, 1908, comes the defendant and demurs to the amended declaration filed in this case and says that the same is not sufficient in law, and for causes of demurrer shows unto the Court:

First.—That after the making and delivery of the bond upon which this suit is instituted the plaintiff, without the consent of, or notice of this defendant, made material changes by the amended ordinance cited and referred to in the plaintiff's declaration.

(a.) By changing the route of the proposed line of railway as follows:

“The line of said railway shall not pass less than two miles Southwesterly of the principal plaza of the town of Rio Piedras or less than three miles Easterly of the principal plaza of the town of Ray Amon, without the special consent of the Executive Council.”

(b.) By changing and limiting the number of men that might be employed by the railway company for which this bond is given as surety as follows:

“Such number of men shall be employed in the prosecution of said work as shall be necessary to complete the same on or before the said first day of January, 1905, provided that the number of men to be actually employed and engaged in the construction of said road on or before the 7th day of August, 1904, shall not be less than two hundred

and fifty, and provided, further, that the number of men engaged in the work of construction shall be increased beyond the number of two hundred and fifty and up to the number of five hundred or approximately that number, it being the intention and purpose of this ordinance to provide that as many men shall be engaged in said construction work within the dates specified as are necessary to complete the same without employing a larger force than can be advantageously engaged in said work."

Second.—The changes made in the original ordinance by the amendment thereto enacted by the Executive Council of the Government of Porto Rico without the knowledge or acquiescence of the defendant company therein and thereto so far change the character of the undertaking as to release the surety upon the bond in this case and relieve this defendant from all liability thereon.

Third.—The condition of the bond in this case discloses a cause of action, if any, in the nature of a penalty and in the absence of any allegation of loss or damage accruing against the obligee and the assertion of any such, the action falls.

Fourth.—The sum named in the bond in this case is in the nature of a penalty and not liquidated damages, as appears by the conditions of the bond, and in the absence of any allegation of actual damage and in the absence of any agreement for liquidated damages, the same must be regarded as a penalty and not as liquidated damages.

Fifth.—The condition of the bond is not only that the work shall be completed by a certain time, but also provides that the obligor shall pay to the obligee any loss or damage accruing against the obligee by reason of the construction of the works in said ordinance authorized, at any time during the period of construction,

therein limited, and before the completion of said work shall have been certified by the Commissioner of the Interior.

Sixth.—The sum named in the bond being clearly by its terms in the nature of a penalty and not as liquidated damages, no cause of action arises because of any or all of the facts alleged in the plaintiff's declaration.

Seventh.—The record in this case clearly and conclusively shows that this Court has not jurisdiction of the action the plaintiff having no right to sue in this Court under any law of Congress or any provision of the Constitution of the United States.

Eighth.—As the obligation upon which this suit is instituted is treated in the amended declaration as a punishment because of the affront to the people of Porto Rico, therefore this Court will not entertain jurisdiction to enforce a penalty or punishment prescribed by the laws of Porto Rico, and the only tribunal that can take cognizance of the same is vested in the Courts of Porto Rico.

(Sgd.) WILLARD, WARREN & KNAPP,
Attorneys for Defendant.

(Endorsed: No. 66. October Sessions, 1906. Circuit Court of U. S. Middle District of Penna. The People of Porto Rico *v.* Title Guaranty and Surety Company. Demurrer to Plaintiff's Amended Declaration. Filed Nov. 2, 1908. E. R. W. Searle, Clerk. Willard, Warren & Knapp, Attorneys & Counselors, Scranton, Pa.)

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA.

No. 66. Oct. T., 1906.

Porto Rico

v.

The Title Guaranty and Surety Company.

Now, November 2, 1908, the demurrer to the plaintiff's statement is overruled with leave to plead to the action and to file an affidavit of defense within thirty days.

R. W. ARCHBALD,
Dist. Judge.

The defendants pray an exception which is allowed.

R. W. ARCHBALD,
Dist. Judge.

November 2, 1908.

(Endorsed: No. 66. October T., 1908. *Porto Rico v. Title Guaranty & Surety Co.* Order. Filed November 2, 1908. E. R. W. Searle, Clerk.)

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA.

No. 66. Oct. Sessions, 1906.

The People of Porto Rico

v.

The Title Guaranty and Surety Company.

AFFIDAVIT OF DEFENSE.

L. A. Watres, being duly sworn according to law, deposes and says that he is the President of the defendant company and has full authority and knowledge to make this Affidavit of Defense; that the said Title Guaranty & Surety Company has a full, complete and entire defense to the whole of the plaintiff's claim as set forth in its declaration, the nature and character of which is as follows, to wit:

First.—The bond upon which this suit is founded purports to be a bond for the performance of certain duties by a company known as the Vandegrift Construction Company. The original bond purports to have been executed by the Vandegrift Construction Company, as principal, the Union Surety & Guaranty Company and this defendant, as sureties, conditioned, among other things, for the completion of a certain railway system and other improvements authorized by an alleged ordinance of the Executive Council of the Island of Porto Rico granting a franchise to the Vandegrift Construction Company for the building and completion of a certain line of railway and for other purposes fully set forth in an ordinance of the Executive Council of Porto Rico, approved by the Governor of said territory and by the President of the United States.

Second.—And this deponent further avers that the ordinance mentioned in the first paragraph of this affidavit was at the time the bond in question was given inoperative and void for the reason that by virtue of an act of Congress entitled “An act temporarily to provide revenues and civil government for Porto Rico and for other purposes,” approved April 12, 1900, it is provided in the latter clause of Section 32 of said Act as follows:

“Provided, however, that all grants of franchises, rights and privileges or concessions of a public or quasi-public nature shall be made by the Executive Council with the approval of the Governor and all franchises granted in Porto Rico shall be reported to Congress, which hereby reserves the power to annul or modify the same.”

And this deponent avers that the said act contemplated action by Congress on said franchise, and on the 15th day of December, 1903, the said ordinance was referred in the Senate to the Committee on Pacific Islands and Porto Rico, where it has slumbered ever since it was so referred to said committee. And said franchise not having been acted upon by the Congress, it is null and void and for the same reason the bond upon which this suit is brought was at the time of bringing said suit, and is now, absolutely null and void.

Third.—That the bond in question was and is a bond of indemnity given for the performance of certain duties by the Vandegrift Construction Company and that only. The declaration alleges that soon after the bond was executed the People of Porto Rico, the plaintiff in this case, allowed the Vandegrift Construction Company to assign all the rights and franchises granted by the ordinance aforesaid to the Porto Rico Railway, Light and Power Company, and that the Railway Company, to wit, the Porto Rico Railway, Light and Power Company, commenced the construction of the works authorized by the said ordinance; that the

assignee, to wit, the Porto Rico Railway, Light and Power Company, was recognized by the people of Porto Rico as the holder of said franchises, privileges and rights granted therein and the party to exercise and enjoy the same. And this deponent further avers, that no right of action exists as against the Vandegrift Construction Company or this defendant for any failure on the part of the Porto Rico Railway, Light and Power Company to comply with the terms and provisions of the said ordinance; and further that the acceptance by the Executive Council of the Government of Porto Rico of the alleged assignee of the Vandegrift Construction Company as the holder of the franchises and rights, concessions, etc., purporting to have been granted by said ordinance, operated in law as a release to the Vandegrift Construction Company and this defendant as surety upon the bond recited in the declaration as having been given to the Executive Council prior to the commencement of the work upon said railroad and prior to the assignment as alleged to the Porto Rico Railway, Light and Power Company, and prior to the enjoyment of any of the rights, privileges, concessions, etc., of said ordinance. And this deponent is informed and believes that the bond alleged to have been executed by it as surety for the Vandegrift Construction Company in no way applies to any default in the performance of its duties on the part of the Porto Rico Railway, Light and Power Company, and that no action can be maintained upon this bond for any such default.

Fourth.—And this deponent further avers, that after its execution by the defendant, on the 23rd day of May, 1903, the said bond was forwarded to Porto Rico, and this deponent was informed that the said bond could not be accepted or approved by the Executive Council of Porto Rico until this defendant had procured a license from the government of Porto Rico to

do business in the Island of Porto Rico, and until it had paid a stamp tax and had the said bond stamped with a revenue stamp of the denomination of fifteen dollars (\$15.), nor until the said defendant had designated a proper attorney in Porto Rico upon whom service of process could be had, according to the laws and ordinances of the people of Porto Rico; that immediately on learning that fact this defendant notified the proper officers of the people of Porto Rico of the withdrawal of said bond by a notice given by its attorney, Edourd Lugo-Vina; that when the said attorney notified the Treasurer of Porto Rico, one Mr. Willoughby, the said Willoughby replied it is too late, the bond is approved and we cannot change it, while in truth and in fact the bond had not been approved by the Executive Council of Porto Rico, except upon the condition that this defendant should procure a license as above stated, should designate an attorney upon whom service of process could be had against this defendant, and should affix to the said instrument the revenue stamps required to be so affixed by the laws of Porto Rico amounting to the sum of fifteen dollars (\$15.), all of which conditions this defendant refused to comply with and notified the Treasurer and other proper authorities of Porto Rico of its withdrawal of the bond in question.

Fifth.—And this deponent further avers that it was unlawful for the defendant to do business in Porto Rico without taking out the license above specified, and so it is prescribed in the laws and ordinances for the civil government of Porto Rico; that it was also illegal to issue said bond without the proper revenue stamp amounting to fifteen dollars (\$15.) was attached thereto, according to the laws and ordinances of Porto Rico, and that it was unlawful for said company to transact any business whatever on the Island of Porto

Rico without having designated an attorney upon whom service could be made against said Company, as provided in the laws and ordinances of Porto Rico, all of which facts were known to the said People of Porto Rico, the plaintiff in this case, and hence the said bond when it was surreptitiously obtained from this defendant by the people of Porto Rico was illegal and void.

Sixth.—That the bond in question in this suit, and upon which the plaintiff's action is founded, provided explicitly, as follows:

“Provided, however, and upon the following express conditions, first, that no extension of the time or times limited in said ordinance for the completion of the work therein authorized, or any part thereof, whether granted with or without the knowledge or consent of the surety, shall in any way discharge the sureties from liability upon this bond.”

And this deponent further avers that the original ordinance of March 21, 1903, which was attached to the said bond, was materially changed without the consent of the defendant by a subsequent ordinance adopted long after the alleged execution of the bond in suit, to wit, on the second day of August, 1904, which said changes were as follows:

By striking out all the part of Section one of said ordinance beginning with the commencement of line 23 on page 2 thereof and continuing to and including the word “council” in line 27 on page 2 of said ordinance, which said words were as follows:

“The line of said railway shall not pass less than two miles Southwesterly of the principal plaza of the town of Rio Piedras or less than three miles Easterly of the principal plaza of the town of Bayamon, without the special consent of the Executive Council,”

The supplemental ordinance also amended the original ordinance as follows:

"Before the first day of January, 1905, the grantee herein shall cause the road-bed of such railway to be completely graded between the Island of San Juan and the Urban of the Municipality of Caguas, and such number of men shall be employed in the prosecution of said work as shall be necessary to complete the same on or before the said 1st day of January, 1905, provided that the number of men to be actually employed and engaged in the construction of said road on or before the 7th day of August, 1904, shall not be less than two hundred and fifty, and provided further that the number of men engaged in the work of construction shall be increased beyond the number of two hundred and fifty and up to the number of five hundred men, or approximately that number, it being the intention and purpose of this ordinance to provide that as many men shall be engaged in such construction work within the dates specified as are necessary to complete the same without employing a larger force than can be advantageously engaged in said work, and provided further that all employes, workmen and laborers engaged in the construction of said work shall be paid weekly on such pay-day as the grantee herein may select, and provided further that this extension of time wherein to finish the construction work in this amendment described, is made with the express understanding that upon a failure of the grantee to comply with the terms and conditions herein set forth, the franchise granted to the Vandegrift Construction Company, approved by the Governor of Porto Rico, on the 3rd day of March, 1903, may at the option of the Executive Council of Porto Rico, be subject to immediate forfeiture."

Seventh.—And this deponent further avers that by reason of the changes made as aforesaid in the original franchise, without notice to and without the consent of this defendant, the said bond became inoperative and

void as to this defendant, for the reason that when the change was made they were not bound by the terms of the original franchise or agreement for the reason that that had ceased to exist, and the defendant was not bound by the franchise or agreement in its altered form, for that this defendant had never assented to.

Eighth—And this deponent further avers that the bond in question was and is a bond of indemnity; that liquidated damages were never agreed upon between the parties, and by the plain terms of the language used in the bond, it was purely to indemnify the plaintiff for any damage that it might suffer. The condition of the bond in question was not only that the work should be completed within a certain time, but it provided also as follows:

“And shall pay to the obligee any loss or damage occurring against the said obligee by reason of the construction of the works in said ordinance authorized at any time during the period of construction therein limited, and before the completion of said work shall have been certified by the Commissioner of the Interior as in Section 35 of said ordinance provided.”

And this deponent further avers that not only was the condition of the bond as above stated, but the ordinance itself in Section 34 thereof provided as follows:

“And conditioned also upon the payment by the grantee to the people of Porto Rico of any loss or damage or costs accruing against the people of Porto Rico by reason of the construction of the works herein authorized at any time during the period of construction herein limited and before the completion thereof shall have been certified by the Commissioner of the Interior as in Section 35 provided.”

And this deponent is informed and believes that according to the intent and purpose of said bond, and according to the conditions thereof, it is not liable

under the terms of said bond for any amount as liquidated damages, but according to the conditions of said bond the sum of one hundred thousand dollars (\$100,000.) named therein is only a penalty and not liquidated damages, and that the plaintiff in this case can only recover thereunder such damages as it has actually sustained and can prove on the trial of this case. And this deponent is further informed and believes that the plaintiff in this case has sustained no damage whatever by the reason of non-construction of the road and works in said ordinance specified, and that whatever damage has been done to the people of Porto Rico by reason of the construction of said road is easily ascertainable, and being so ascertainable this bond becomes simply an indemnity for damages sustained by the plaintiff, whatever they may be. And this deponent is here and now ready to answer for any damages that the plaintiff can establish sustained by said plaintiff by the reason of the non-performance on the part of the Vandegrift Construction Company of the road and works agreed to be constructed by said Company. And this deponent is further informed and believes that under the express words of the bond, and under the law of the land, it is only liable to the plaintiff for actual damages by it or them sustained; and that by reason of the condition of said bond the sum specified, to wit, one hundred thousand dollars (\$100,000.) is and was intended by the parties as a penalty and not as liquidated damages, and, therefore, the plaintiff is not entitled to recover under its declaration filed in this case.

Ninth.—And this deponent is further informed and believes that the declaration in this case is founded upon the theory of a statutory penalty imposed by the ordinances in question enacted as above set forth by the Executive Council of Porto Rico. In other words the plaintiff in this case seeks to exact from the defendant the sum of one hundred thousand dollars (\$100,000)

as liquidated damages by reason of the defendant having violated the terms of a statute or ordinance of Porto Rico. And this deponent is informed and believes that the plaintiff, by its declaration, seeks to enforce this penalty as liquidated damages for the reason and because the people of Porto Rico have been affronted by the defendant for the violation of a penal or punishment statute or ordinance enacted by the Executive Council of Porto Rico. And this deponent is informed and believes that this Court, to wit, the Circuit Court of the United States for the Middle District of Pennsylvania, has no jurisdiction and can maintain no jurisdiction for the enforcement of this penal or punishment statute prescribed by the legislature of Porto Rico. And this deponent is informed and believes that this Court will not and cannot enforce the terms of such a punishment statute prescribed by the legislature of Porto Rico, for the reason that a Circuit Court of the United States cannot entertain jurisdiction in behalf of the people of Porto Rico and recover a penalty imposed by way of punishment for a violation of a statute or ordinance of Porto Rico.

All of which facts the defendant in this case expects to be able to establish and prove on the trial thereof.

Sworn and subscribed to before me this 19th day of November, 1908. } (Signed.) L. A. WATRES.

(Signed) JUDSON E. HARNEY,
(SEAL) Notary Public.

My commission expires at the end of the next session of the Senate.

(Endorsed: No. 66. October Term, 1906. Circuit Court of U. S. Middle District of Pa. The People of Porto Rico v. The Title Guaranty and Surety Company. Affidavit of Defense. Filed Nov. 20, 1908. E. R. W. Searle, Clerk. Willard, Warren & Knapp, Attorneys & Counselors, Scranton, Pa.)

IN THE CIRCUIT COURT OF THE UNITED STATES, MIDDLE
DISTRICT OF PENNSYLVANIA.

No. 66. October Term, 1906.

The People of Porto Rico
against
The Title Guaranty & Surety Company.

Now, November 19th, 1908, comes the defendant,
by its attorneys, Willard, Warren & Knapp, and pleads
to the action in this case *non assumpsit*.

WILLARD, WARREN & KNAPP,
Attorneys for Defendant.

(Endorsed: No. 66. October T. 1906. Circuit
Court of U. S. Middle District of Pa. The People
of Porto Rico v. The Title Guaranty and Surety
Company. Plea. Filed Nov. 20, 1908. E. R. W.
Searle, Clerk. Willard, Warren & Knapp, Attys,
for deft.)

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA.

No. 66. October Sessions, 1906.

The People of Porto Rico

v.

The Title Guaranty & Surety Company.

And now, December 7th, 1908, on motion of William J. Hand, Esq., plaintiff's attorney, rule on defendant to show cause why judgment should not be entered for want of a sufficient affidavit of defense. Returnable *sec. leg.*

WILLIAM J. HAND,
Plff's Atty.

(Endorsed: No. 66. October Sessions, 1906. The People of Porto Rico v. The Title Guaranty and Surety Company. In the Circuit Court of the United States for the Middle District of Pennsylvania. Rule for Judgment for want of Sufficient Affidavit of Defense. Filed Dec. 7, 1908. E. R. W. Searle, Clerk.)

The People of Porto Rico

v.

The Title Guaranty & Surety Company.

No. 66.

JURY AND WITNESSES.

Asa Bronson
A. F. Smith
W. W. Newhart
F. H. Ball
W. P. Noll
John S. Mott
Thomas Moore
A. C. Kleeman
Maxwell Parks
A. R. Dobbs
S. T. McAllister
Jos. Fultz

PLAINTIFF'S WITNESS LIST.

W. H. Willoughby
Vandegrift
Yeager
Elliott.

(Endorsed: No. 66. The People of Porto Rico v. The Title Guaranty & Surety Company. Jury and Witness List.)

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA.

No. 66. October Sessions, 1906.

The People of Porto Rico

v.

The Title Guaranty & Surety Company.

AND NOW, comes the above named defendant, The Title Guaranty & Surety Company, and moves the Court to dismiss this suit for want of jurisdiction and that it go hence with its costs in this behalf incurred, for that it appears from the pleadings filed in this case on behalf of the plaintiff that there is no dispute or controversy in this case with reference to the Constitution, laws or treaties of the United States, nor is there any diversity of citizenship within the meaning of the statute conferring jurisdiction upon the Circuit Courts of the United States, and it not appearing that the Court has jurisdiction upon any of the other grounds mentioned in the said Act conferring jurisdiction upon the Circuit Courts. Wherefore, defendant prays that because the suit does not really and substantially involve a controversy properly within the jurisdiction of this Court, that the same be dismissed.

WILLARD, WARREN & KNAPP,
JOHN P. KELLY,

Solicitors for Defendant.

November 3rd, 1909.

(Endorsed: No. 66. October Sess., 1906. The People of Porto Rico v. The Title Guaranty & Surety Company. Motion to Dismiss Action for Lack of Jurisdiction. Motion overruled and exceptions noted. R. W. Archbald, Dist. Judge. Filed, Nov. 3, 1909. E. R. W. Searle, Clerk. John P. Kelly, Willard, Warren & Knapp, Attorneys & Counselors, Scranton, Pa., pro deft.)

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA.

No. 66. October Term, 1906.

In re,

The People of Porto Rico

v.

The Title Guaranty & Surety Company.

Now, December 29, 1909, this cause coming on to be heard on rule to show cause why the compulsory nonsuit entered at the trial should not be taken off, and a new trial awarded, and having been argued by counsel for the respective parties, upon due consideration thereof, it is thereupon

Ordered and adjudged that the rule to show cause be and the same is hereby discharged, and judgment is directed to be entered in favor of the defendant for costs, to which refusal to take off said nonsuit, and the direction of the judgment in favor of the defendant, the plaintiff excepts.

R. W. ARCHBALD,
District Judge.

(Endorsed: No. 66, Oct. T. 1906. In the Circuit Court of the United States for the Middle District of Pennsylvania. In re, The People of Porto Rico v. The Title Guaranty and Surety Company. No. 66, October Term, 1906. Order. Filed U. S. Cir. & Dist. Court Middle Dist. of Pa. Dec. 29, 3:21 P. M. 1909. E. R. W. Searle, Clerk.)

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA.

No. 66. October Term, 1906.

The People of Porto Rico

v.

The Title Guaranty & Surety Company.

Now, December, 30th, 1909, it is agreed that the time for settling and filing the bill of exceptions in the above entitled case, may be extended to January 15th, 1910.

WILLIAM J. HAND,
Attorney for Plaintiff.

E. N. WILLARD,
Attorney for Deft.

Now, to wit, December 30th, 1909, it is ordered that the time for settling and filing the bills of exceptions in the above entitled case, shall be extended to January 15th, 1910.

R. W. ARCHBALD,
Dist. Judge.

(Endorsed: No. 66, Oct. T. 1906. The People of Porto Rico v. The Title Guaranty & Surety Co. Agreement & Order. Filed U. S. Cir. & Dist. Court Middle Dist. Pa., Dec. 30, 4:03 P. M. 1909. E. B. W. Searle, Clerk.)

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA.

No. 66. October Term, 1906.

The People of Porto Rico

v.

The Title Guaranty & Surety Company.

To E. R. W. Searle, Clerk of said Court:—

You are hereby respectfully requested to enter judgment for the defendant in the above stated case for costs, as directed by the order of the Honorable R. W. Archbald, of December 29, 1909.

E. N. WILLARD,
Attorney for Defendant.

(Endorsed: No. 66, Oct. T. 1906. Circuit Court of U. S. Middle District of Pa. The People of Porto Rico v. Title Guaranty & Surety Company. Preceipe for Judgment for Defendant. Filed U. S. Cir. & Dist. Court Middle Dist., Pa., Dec. 31, 10:14, A. M. 1909. E. R. W. Searle, Clerk.)

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA.

No. 66. October Term, 1906.

AT LAW.

The People of Porto Rico
v.
The Title Guaranty & Surety Company.

PETITION FOR WRIT OF ERROR.

And now comes the People of Porto Rico, plaintiff herein, and says that on or about the 29th day of December, A. D. 1909, this Court entered judgment herein in favor of the defendant against this plaintiff, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed in this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals, for the Third Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

WM. J. HAND,
Attorney for Plaintiff.

(Endorsed: No. 66. October Term, 1906. The People of Porto Rico v. The Title Guaranty & Surety Company. Petition for Writ of Error. Filed U. S. Cir. & Dist. Court, Middle Dist. of Pa., Jan. 8, 2.35 P. M., 1910. E. R. W. Searle, Clerk. Wm. J. Hand, Attorney for plaintiff in error.)

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA.

No. 66. October Term, 1906.

AT LAW.

The People of Porto Rico

v.

The Title Guaranty & Surety Company.

This 8th day of January, A. D. 1910, came the plaintiff by his attorney, and filed herein and presented to the Court his petition, praying for the allowance of a writ of error, an assignment of errors intended to be urged by him, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Third Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error, without filing a bond, the same having, by stipulation in writing presented to the Court, been waived by defendant.

(Sgd.) R. W. ARCHBALD,
District Judge.

(Endorsed: No. 66. Oct. Term, 1906. The People of Porto Rico v. The Title Guaranty & Surety Company. Order allowing writ of error. Filed U. S. Cir. & Dist. Court, Middle Dist. of Pa., Jan. 8, 2.35 P. M., 1910. E. R. W. Searle, Clerk. Wm. J. Hand, Att'y. for Plaintiff in error.)

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA.

No. 66. October Term, 1906.

The People of Porto Rico

v.

The Title Guaranty & Surety Company.

Now, to wit, January 8, 1910, the submission of a copy of the plaintiff's proposed bill of exceptions five days before presentation to Court for allowance is hereby waived by the defendant, and it is agreed that the Court may forthwith settle and allow the said bill of exceptions. And the defendant further waives the filing of the bond on writ of error by the plaintiff to the Circuit Court of Appeals for the Third Judicial Circuit in the above entitled case.

(Sgd.) WILLARD, WARREN & KNAPP,
Attorneys for Defendant.

(Endorsed: No. 66. Oct. Term, 1906. The People of Porto Rico v. The Title Guaranty and Surety Company. Waiver of submission of copy of Bill of Exceptions and of bond on appeal. Filed U. S. Cir. & Dist. Court, Middle Dist. Pa. Jan. 8, 11.16 A. M., 1910. E. R. W. Searle, Clerk.)

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA.

No. 66. October Term, 1906.

The People of Porto Rico

v.

The Title Guaranty & Surety Company.

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that in the term of October, A. D. 1906, came the said plaintiff into the said Court and impleaded the said defendant in a certain plea of assumpsit, in which the said plaintiff declared (prout statement), and the said defendant pleaded the general issue (prout plea), and thereupon issue was joined between them.

And afterwards, to wit, at a Session of said Court, held at Scranton in said District, before the Hon. R. W. Archbald, District Judge, sitting as a judge of the said Circuit Court, on the 3rd day of November, A. D. 1909, the aforesaid issue between the said parties came to be tried by a jury of the said District, for that purpose duly impaneled (prout list of jurors), at which day came as well the said plaintiff as the said defendant by their respective attorneys, and the jurors of the jury aforesaid impaneled to try the said issue being also called, came and were then and there in due manner chosen and sworn to try the said issue; and thereupon the following proceedings were had, and evidence given and testimony taken to sustain the issue on the part of the plaintiff.

Appearances: For the plaintiff: MESSRS. W. J. HAND
and FRANK FEUILLE.

For the defendant: MESSRS. WILLIARD,
WARREN & KNAPP, and HON. JOHN
P. KELLY.

And now comes the above named defendant, the Title Guaranty & Surety Company, and moves the Court to dismiss the suit for want of jurisdiction and that it go hence with its costs in this behalf incurred, for that it appears from the pleadings filed in this case on behalf of the plaintiff that there is no dispute or controversy in this case with reference to the constitution, laws or treaties of the United States, nor is there any diversity of citizenship within the meaning of this statute conferring jurisdiction upon the Circuit Courts of the United States, and it not appearing that the Court has jurisdiction upon any of the other grounds mentioned in the said act conferring jurisdiction upon the Circuit Courts; wherefore, defendant prays that because the suit does not really and substantially involve a controversy properly within the jurisdiction of this Court, that the same may be dismissed.

THE COURT: The motion is overruled (and exception noted for defendant.)

MR. HAND: I move to amend the statement so as to include interest as part of the damages in this case.

JUDGE WILLARD: I object to the amendment.

THE COURT: The objection is overruled and amendment allowed. (Exception noted for the defendant.)

(Mr. Hand opens for the plaintiff.)

PLAINTIFF'S EVIDENCE.

MR. HAND: We offer in evidence the bond upon which this action is based, a copy of which is appended to the plaintiff's statement, marked Exhibit B, as follows:

Know all men by these presents, that we, the Vandegrift Construction Company, a corporation duly organized under the laws of the State of New Jersey, hereinafter called the principal, as principal, and The Union Surety and Guaranty Company, of Philadelphia, a corporation duly organized under the laws of the State of Pennsylvania, and The Title Guaranty and Trust Company, of Scranton, Pennsylvania, a corporation duly organized under the laws of the State of Pennsylvania, hereinafter called the sureties, as sureties, are held and firmly bound unto the People of Porto Rico, hereinafter called the obligee, in the sum of one hundred thousand dollars, good and lawful money of the United States, for the payment whereof said principal binds itself and its successors, and said sureties bind themselves and their successors, jointly and severally firmly by these presents.

Whereas, by virtue of a certain ordinance enacted by the Executive Council of Porto Rico, on the 2nd day of March, 1903, and approved by the Governor of Porto Rico on the 3rd day of March, 1903, granting to said principal the right to build and operate a line of railway between the municipality of San Juan and the Playa of Ponce in the Island of Porto Rico, and to develop electric energy by water or other power for distribution and sale for railway, lighting and industrial purposes, a copy of which ordinance is hereto annexed, the said principal has undertaken and agreed to build and put in operation a line of railway between the municipality of San Juan and the Playa of Ponce, in the Island of Porto Rico, and to build and equip

power plants to develop electric energy for the operation of said railway and for other purposes within the period of three years from the date of the acceptance of the said ordinance by the said principal.

Now, therefore, the condition of this obligation is such that if the said principal shall within three years from the date of the acceptance by it of said ordinance fully complete the work therein authorized in accordance with the conditions therein contained and in accordance with the plans and specifications therefor approved as therein provided; and within the said period of three (3) years from the date of the acceptance by it of the said ordinance shall build, complete and have in operation the entire line of railway authorized therein for such terminal in the Municipality of San Juan as may be determined by the said Executive Council to its terminal on the Playa of Ponce on a route from Ponce to be determined by the said Executive Council, in accordance with the conditions in said ordinance contained, and in accordance with the plans and specifications therefor approved, as in said ordinance provided, and within the said period of three (3) years from the date of the acceptance by it of the said ordinance, shall also complete and have in operation the entire power plant and transmission lines necessary for operation the said entire line of railway, in accordance with the conditions therein contained, and in accordance with the plans and specifications therefor approved as therein provided; and shall duly perform within the said period of three (3) years, all other terms and conditions in said ordinance required to be performed by the principal within the said period; and shall pay to the obligee any loss or damage accruing against the said obligee by reason of the construction of the works in said ordinance authorized at any time during the period of construction therein limited and before the completion of said work.

shall have been certified by the Commissioner of the Interior, as in section 35 of said ordinance provided—then this obligation shall be void, otherwise to remain in full force and effect.

Provided, however, and upon the following express conditions.

First.—That no extension of the time or times limited in said ordinance for the completion of the work therein authorized or any part thereof, whether granted with or without the knowledge and consent of the sureties, shall in any way discharge the sureties from liability upon this bond; and

Second.—That no suit, action or proceeding shall be brought or instituted against the sureties after the period of five (5) years from the date hereof upon or by reason of any default on the part of the principal in the performance of any of the terms, covenants or conditions of this bond. But all extensions of time granted under the term of the franchise shall be added to the term of five (5) years, so that the life of the bond shall be kept in full force for the five (5) years, and so much additional time as shall be covered by the extension granted.

Signed and sealed this 23rd day of May, nineteen hundred and three.

(Seal) VANDEGRIFT CONSTRUCTION COMPANY,
By J. A. Vandegrift, President.
Attest: Herbert A. Clarke, Sec.

(Seal) THE UNION SURETY & GUARANTY Co.,
By Eugene Van Schaick, Chairman.
Attest: W. S. MacKellar, Secretary.

THE TITLE GUARANTY & TRUST COMPANY
of Scranton, Pennsylvania,
(Seal) By Edwin B. Hay, Resident Vice-President.

Attest: Geo. T. Parker, Resident Agt.

(Endorsed: San Juan, June 4, 1903.)

The within bond of the Vandegrift Construction Company to the People of Porto Rico, dated May 23, 1903, is satisfactory in form to me.

Frank Feuille, Acting Attorney General
San Juan, June 4, 1903.

The within bond is satisfactory as to sufficiency to me.

William F. Willoughby,
Treasurer of Porto Rico.

(The bond is marked "Plaintiff's Exhibit A, November 3, 1909.")

MR. HAND: I offer in evidence the original ordinance.

JUDGE KELLY: We object to the offer as incompetent, irrelevant and immaterial.

THE COURT: The ordinance having been referred to in condition of the bond it seems to me it is material to have it before the Court and jury, and I will therefore admit it. (Exception noted for the defendant.)

(The ordinance is marked "Plaintiff's Exhibit B, November 3, 1909.")

The ordinance is as follows:

"An ordinance granting to the Vandegrift Construction Company the right to build and operate a line of railway between the municipality of San Juan and the Playa of Ponce in the Island of Porto Rico, and to develop electric energy by water or other power for distribution and sale for railway lighting and industrial purposes.

Be it ordained and enacted by the Executive Council of Porto Rico:

Section 1. That the Vandegrift Construction Company, a corporation organized under the laws of the State of New Jersey, assignee of Walter M. Yeager,

be and it is hereby authorized and empowered to construct, maintain and operate a railway in Porto Rico for the conveyance of persons and property for hire, from the municipality of San Juan to the Playa of Ponce, and through intermediate points, substantially along the following route to be subsequently prescribed in detail by the Executive Council:

Beginning at a point in the municipality of San Juan, to be subsequently determined by the Executive Council, thence by a line parallel with the southerly side of the right of way of the Compannia de los Ferrocarriles de Puerto Rico, now the American Railroad Company of Porto Rico, to a point at or near Martin Pena; thence in a southerly direction following the valley of the Rio Piedras to a summit about three miles westwardly from Trujillo Alto; thence south-eastwardly to a point in the valley of the Rio de Loiza; thence by the valley of the said Rio de Loiza to a point in the insular road eastwardly from the urban portion of the municipality of Caguas; thence by said insular road through the urban portion of the municipality of Caguas, and thence diverging to the valley of the Rio Gurabo; thence along the valley of the Rio Gurabo to its head waters; thence across the summit known as Las Cruces to the valley of a branch of the Rio de la Plata; thence along same to its intersection with the military road; thence along the military road to and through the urban portion of the municipality of Cayey; thence along the general line of the old trail leading from Cayey to Salinas to a point near the summit of the Cordillera; thence parallel in general with said summit, crossing the same at or near the headwaters of the Rio de Cuyon; thence through the valley of the Rio de Cuyon to a point in the military road eastwardly from the urban portion of the municipality of Coamo; thence by the military road to and through Coamo; thence following the Rio Coamo and along-

side the public road to Coamo Springs to a point at or near the latter place; thence to a point near the easterly limits of the urban portion of the municipality of Juana Diaz; thence along and upon the side of the military road to and through Juana Diaz to Ponce; thence by some route to be subsequently determined by the Executive Council to the Playa of Ponce.

The line of said railway shall not pass less than two miles southwesterly of the principal plaza of the town of Rio Piedras, or less than three miles easterly of the principal plaza of the town of Bayamon, without the special consent of the Executive Council. No part of said railway line shall be constructed or condemnation proceedings for a right of way therefor be instituted by the grantee, until the exact location of that part of the proposed right of way shall have been approved by the Executive Council.

Section 2. That part of said railway lying between Juana Diaz and Ponce may run alongside or upon the military road, according to the discretion of the Commissioner of the Interior as to location, construction, maintenance and repair of the said railway and military road, bridges, culverts and walls, but all side tracks or any second or double track shall be laid outside of said military road on property acquired by the grantee for that purpose.

Section 3. The grantee, without the further consent of the Executive Council, shall not accept passengers or freight either for hire or otherwise for transportation either way between any part of the urban portion of the municipality of San Juan and Martin Pena, or for transportation either way between any part of the urban portion of the municipality of Ponce and the Playa of Ponce. For each and every breach by the grantee of the terms of this section a penalty of one hundred dollars shall be recoverable in any court of competent jurisdiction as liquidated

and agreed damages by The People of Porto Rico or by any person, firm or corporation enjoying the franchise and privilege under a lawful grant of transporting goods and passengers between the points in this section set forth.

Section 4. The grantee, with the approval of the Commissioner of the Interior, may acquire by purchase or otherwise such property as may be necessary for the construction and maintenance of branch roads to plantations, central factories or warehouses for sugar, coffee, tobacco or other products; provided that in all such cases where the proposed branch road shall rest upon any public highway or street or other public property, the special consent of the Executive Council shall first be obtained. But no royalty or other form of compensation shall be exacted from the grantee for such consent.

Section 5. The gauge of the railway line to be constructed, maintained and operated under the terms hereof shall be the standard gauge of four feet and eight and one-half inches in width. The right of way of said railway shall not exceed four (4) rods in width, with such additional width as may be necessary for the slopes of cuts and embankments; and the grantee may construct and maintain outside thereof such turn-outs, switches, spurs, branches and sidings as may be necessary or convenient for the operation of said line; provided that nothing in this section contained shall be construed or deemed to give to the grantee any right of way on said military road or on any other public highway, except as provided in sections 7 and 8 hereof; the space occupied by any track on said military road or other public highway shall be open to use to the public.

Section 6. The said railway shall be operated by electric power, but during the course of construction thereof may be operated by steam or other power. The

operation of the said railway shall be subject at all times to such police regulations as may be established by law; and at grade crossings and other points of danger the Commissioner of the Interior in his sole discretion may require the grantee to maintain gates, guards or other form of protection.

Section 7. The grantee may construct on its road-bed acquired hereunder either a single or a double track road; provided that wherever its road is constructed upon or across any part of a public highway or passes through the streets of any municipality, it may not lay or operate a double track without the special consent of the Executive Council; but no royalty or other form of compensation shall be exacted from the grantee for such consent.

Section 8. Except between Juana Diaz and Ponce as hereinbefore provided, and except through the urban portions of municipalities, at approaches to and on bridges which in the judgment of the Commissioner of the Interior may safely and properly be used, and at places where, in the sole judgment of the Executive Council, insuperable engineering difficulties are presented in the construction of said railway line upon an acquired right of way, the grantee, between San Juan and Ponce, may not construct its said railway upon the said military road, or within the space reserved therefor or upon any other public highway; but this prohibition shall not be held to forbid or prevent the crossing of said military road or any such highway by said railway wherever the needs of the grantee require the right of way to change from one side of said military road or highway to the other side thereof. But no such crossing shall be made except at points and upon plans first approved by the Commissioner of the Interior.

Section 9. Wherever said railway crosses or rests upon the military road or other public highway,

the roadbed between the tracks and for a space of a foot and a half on either side thereof shall be maintained by the grantee in a state of repair satisfactory to the Commissioner of the Interior; and such roadbed shall be constructed and maintained so as not to interfere with the proper drainage of such road or highway.

Section 10. Whenever directed by the Commissioner of the Interior so to do the track of the grantee where it crosses or rests upon said military road or other public highway shall be altered or required by the grantee in accordance with plans approved by said Commissioner; and upon the failure of the grantee to make such alteration or repairs they may be made by the said Commissioner, and the cost thereof shall be recoverable against the grantee as a first lien upon all of its rights and property hereunder.

Section 11. Free right of way for said railway and overhead trolley construction, together with branch power transmission pole lines from the power stations to the main line, is hereby granted through and over all insular public lands and through all municipalities and towns and the lands, streets and highways thereof; provided, however, that the location of said right of way of all such poles and lines shall be first approved by the Commissioner of the Interior, except at points where the right of approval is herein reserved to the Executive Council. And when directed by the Executive Council or the Commissioner of the Interior so to do any such pole or power lines shall be renewed or relocated by the grantee.

Section 12. Each and everything authorized to be done, acquired, constructed, built, operated or maintained by or under this ordinance, including all necessary roadbeds, tracks, sidetracks, spurs and branch roads, all cuts, fills, embankments and drainage canals, all overhead trolley and power transmission lines, poles

and wires, all dams, reservoirs, canals, pipe lines, sluices, waterways and power plants, and all bridges, ferries, wharves, stations, terminals, depots and buildings, and the approaches thereto, are matters of public interest conducing to the general welfare, and are therefore hereby declared to be of public utility for all purposes; and all lands necessary for the construction, operation and maintenance of the said railway or any part thereof, or of said roadbed, tracks, side tracks, branch roads, cuts, fills, embankments, drainage canals, overhead trolley and power transmission lines, poles, wires dams, reservoirs, canals, pipe lines, sluices, power plants, bridges, ferries, wharves, stations, terminals, depots and buildings connected therewith, and the approaches thereto, may be acquired by the grantee by purchase or grant or by process of condemnation or forcible expropriation.

Section 13. The grantee, with the approval of the Commissioner of the Interior and upon reasonable notice to the owner or agent thereof, is authorized at all times to enter upon and occupy private and public lands and property for the purpose of making surveys or determining the route of the lines or the location of dams, power houses, poles, lines and other matters entering into the construction or operation of said electric railway.

Section 14. An accurate survey of the route of the said railway shall be submitted by the grantee through the Commissioner of the Interior for the approval of the Executive Council within three months from the date of the acceptance of this ordinance by the grantee as hereinafter provided; and all plans for roadbeds, tracks, side tracks, bridges, embankments and for the general construction of the said railway shall be submitted to the Commissioner of the Interior and be approved by him before the work of building the same shall proceed.

Section 15. Within one year from the date of such acceptance hereof the grantee shall cause the roadbed of said railway to be completely graded between the island of San Juan and the urban portions of the municipality of Caguas; and shall also cause the foundations and approaches of its proposed bridge across the body of water flowing through the Boqueron into the harbor of San Juan to be completed, and shall have contracted for the material necessary for the superstructure of such bridge.

Section 16. Within two years from the date of such acceptance hereof the grantee shall have completed and in readiness for service for the conveyance of passengers and freight, those parts of said railway lying between the urban portions of the municipalities of San Juan and Caguas and between the urban portions of the municipalities of Ponce and Juan Diaz, respectively. It is, however, expressly understood and agreed that upon the failure by the grantee to complete and have its proposed line in full operation across the island within the time limited in section 17 hereof, or upon its failure thereafter to continue the full operation of said railway line across the island, its right to operate any portion of the railway line in this ordinance authorized, or to distribute and sell electric light and power as herein granted, shall cease and determine and shall be taken and deemed to be forfeited and at an end, unless such failure shall be deemed and declared by the Executive Council to be due to the act of God or the public enemy or to an injunction, entered in a judicial proceeding of such character, that the Executive Council in its sole judgment may deem such injunction sufficient cause for an extension of any of the several periods of time limited herein.

Section 17. Within three years from the date of such acceptance hereof the grantee shall have com-

pleted and in operation the entire line of railway herein authorized from its terminal in the municipality of San Juan to its terminal on the Playa of Ponce.

Section 18. The grantee shall cause the power dam at Comerio Falls to be completed within one year from the date of the acceptance hereof as herein provided; and shall within the same period have under contract the major part of the electrical apparatus necessary for the transformation of the power to be obtained therefrom into electric energy. The entire power plant and transmission lines necessary for operating said railway shall be completed within three years from the date of the acceptance hereof.

Section 19. The grantee is hereby authorized and empowered to construct, acquire, maintain and operate power plants at and in the neighborhood of the place known as "Comerio Falls" on the river known as the "Rio de la Plata," and at the place known as "El Penon" on the river known as the "Rio de Loiza," and at other places on either or both of said rivers, for the purpose of converting the water power of the said rivers into electric energy for the operation of said railway, and for the promotion of the concessions, rights and privileges granted herein; and to use the waters of the said rivers for said purposes free from interference or detention except as to rights heretofore acquired therein by others; said waters after being so used shall be returned to the channel of the river; and the grantee may construct, acquire, maintain and operate such dams across the said rivers, or either of them, and upon the lands of the abutting owners as may be necessary for the proper use of said waters and the operation of the machinery necessary to generate such electric energy; and may construct, maintain and operate the necessary reservoirs, canals, pipe lines, sluices, waterways, poles, wires and other appurtenances for the generation, development and

transmission of electricity, for the operation of said railway and for lighting, industrial and other purposes; and may convey and distribute light and power to any persons, corporations and municipalities, and, subject to the rights herein reserved to the Executive Council, may regulate the time and manner in which said lighting and power shall be delivered and the compensation to be received therefor; and subject to approval as herein provided, may locate, construct and maintain lines of poles necessary to carry wires for the transmission of light and power along the line of survey of any completed or uncompleted public road or highway, or along any other route or routes that may be required by it. All such dams, reservoirs, canals, pipe lines, sluices, waterways, poles, wires and other appurtenances, are hereby declared to be of public utility for all purposes.

But it is expressly agreed and understood that no private property shall be used for any of the purposes in this section set forth until the right to the use thereof or the title thereto shall have been acquired by the grantee by purchase, condemnation, private agreement or otherwise; nor shall any part of any public road or highway or any public lands or other property, whether municipal or insular, be used for the purposes in this section provided until the plans and specifications for such use thereof have been approved by the Commissioner of the Interior or by the Executive Council, as hereinafter or hereinbefore provided.

Section 20. The grantee, subject to the approval of the Commissioner of the Interior, and only upon the place and specifications to be submitted to him for that purpose, shall have the right to cross, intersect, join or unite its said railway lines with any other railway line heretofore constructed or hereafter to be constructed in Porto Rico at any point on its route

and upon its own lands or upon the lands of such other railway; and may construct and maintain all such turnouts, switches and other conveniences as may be necessary for said purposes, but no such use shall be made of the property of any other railway except upon the payment of just compensation. And any railway line heretofore or hereafter to be constructed, shall have the right, subject to like approval by the Commissioner of the Interior and to the payment of just compensation to cross, intersect, join or unite with the railroad lines of the grantee hereunder; and for that purpose may construct and maintain all such turnouts, switches and other conveniences as may be necessary therefor.

Section 21. The grantee shall have the power to lease, purchase or operate any other line or lines of railway now existing or hereafter constructed; but no such lease, purchase or operating contract shall be entered into except upon the consent of the Executive Council and upon such terms as may be approved by it. In granting its approval of any such lease, purchase or operating contract the Executive Council may extend all the benefits and rights hereunder to any such leased, purchased or operated lines or may impose further conditions upon the grantee and upon such leased, purchased or operated lines.

Section 22. The grantee may furnish electric light and power at all points along the line of its said railway and at any and all other places in the island of Porto Rico; provided that such right to furnish light and power shall not extend to any place, except upon the special consent of the Executive Council, where such right has heretofore been granted by the Executive Council to any other person, firm, or corporation, or exists under any other lawful grant or license. The Executive Council reserves the right to regulate and from time to time to amend or alter the tariff of charges

to be made by the grantee for the distribution and sale of electric light or power to private consumers; and before distributing light or power to private consumers the grantee shall present a schedule of charges to the Executive Council for its approval. The Executive Council reserves the right, however, to require the grantee in the distribution and sale of the surplus electric energy developed on the Rio de Loiza and not needed in the operation of its said railway lines to give the preference to the municipality of San Juan over other private consumers to the extent of 100 horse power.

Section 23. The grantee shall pay to the Treasurer of Porto Rico for the use and benefit of the insular government an annual royalty of two per cent. of the gross receipts accruing to the grantee from the sale and distribution of electric light and power to private consumers; the payment of said royalty shall be made at such times and under such conditions and regulations as the Treasurer from time to time shall establish; and for the purpose of ascertaining the amount due to the Treasurer by way of royalty under the terms of this section the Treasurer and such officials as he may from time to time designate shall have access at all times to the books of said grantee, and may from time to time demand from any officer, agent or employee of said grantee sworn statements in relation to its distribution of electric light and power.

Section 24. A schedule of transportation charges for passengers, freight and express matter, shall be printed and at all times be kept posted at some prominent place in each station of the grantee; and copies thereof shall be furnished to the Commissioner of the Interior. No such schedule may be changed or modified by the grantee until notice thereof shall have been posted upon the prior schedule for a period of ten

days, and until like notice shall have been given to the Commissioner of the Interior. No reduction or rebate from the schedule so posted shall be given by the grantee to any shipper.

Section 25. The charge for the transportation of passengers on the lines of the said railway shall not exceed four (4) cents per mile; provided that for a single ride a minimum charge of five (5) cents may be made. School children shall be transported at reduced rates. The charge for the transportation of freight in bulk, except perishable and special freight, shall not exceed sixteen (16) cents per ton per mile for distances in excess of ten miles. For shorter distances and for freights in less than ton lots, as well as for package and perishable freight and express matter, the charges, subject to the provisions of section 26 hereof, may exceed the above rate.

Section 26. All rules and regulations of the said grantee for the operation of its said railway lines shall be subject to revision, amendment, change or alteration by the Executive Council at any time; and the Executive Council may regulate the speed of cars on said railway lines. And all transportation charges shall be subject to such regulation, revision, amendment, change or alteration as the Executive Council from time to time may require. But in view of the public benefits to result from the construction by the grantee of its said electric railway across the island the Executive Council now gives solemn expression to its belief that public interests may best be served by now declaring that the maximum rate of charges on the foregoing section established ought not to be diminished or reduced for a fixed term of twenty-five years from the date of the acceptance hereof by the grantee.

Section 27. The grantee shall transport free of charge on its said railway line or upon any branch

thereof to and from the courts and prisons of the island any prisoner awaiting trial or who has been convicted of any offense against the penal code or against any police regulation, or any prisoner under orders to be transferred from one prison to another; together with such police or other guards as may reasonably be necessary to guard such prisoners on such journeys; provided, however, that all such prisoners and guards shall be furnished with a statement by a judge of a court certifying that said prisoners are needed in court or that they have been convicted and are on their way to prison, or a certificate by the Attorney General or the Director of Prisons or the warden of a prison that such prisoners are being transferred from one prison to another.

Section 28. The grantee shall convey free of charge officers and members of any insular police or militia force when said officers and members are in uniform and are in the performance of their duty or when not in uniform but on some special service they produce a written order for free transportation signed by the Governor or any of the heads of the general departments of the government; provided, however, that in the absence of a previous notice of at least two days the number of such officers and members to be transported at any one time shall not exceed fifteen. The grantee, upon the written order of the Commissioner of the Interior, shall also convey free of charge, any employee of the Interior Department when on special service in connection with the inspection or supervision of the works herein authorized.

Section 29. The grantee may erect and maintain a telegraph and telephone line upon and along its right of way to be used by it in connection with the operation of its railway lines and power plants and their appurtenances; but said telegraph and telephone line shall in no event be opened to use by the public

for hire or otherwise, unless express authority so to do is hereafter granted by the Executive Council. And for each breach of this provision the grantee shall be subject to a penalty of one hundred dollars as agreed and liquidated damages to be recoverable in a court of competent jurisdiction by the insular government or by the grantee in any valid and existing ordinance or lawful grant for the operation of any general or special telephone system in the island.

Section 30. The term grantee as herein used shall be held to extend to and include the Vandegrift Construction Company and its successors and assigns; and in case of the transfer by the grantee either by its own act or by act of law of the property and property rights acquired hereunder, the purchaser or assignee shall be bound by all the terms hereof of every name and nature. It is expressly understood and agreed that all the property interests and rights of the grantee, including this franchise and all rights and benefits accruing hereunder, may be conveyed in trust or by way of mortgage or otherwise to secure the payment of any lawful obligations of the grantee, its successors or assigns; and the trustee or the holder or holders of any obligation or obligations so secured shall have the right to foreclose or otherwise assert their rights thereon in any competent Court as other similar obligations are foreclosed or enforced; and the purchaser or the first assignee of any purchaser at any foreclosure sale shall be deemed a lawful assignee hereunder, as if such sale and first assignment had been specially approved by the Executive Council; provided that no person, firm or corporation owning, or operating or that is the lessee of any railway line or electric light and power plant, may, without the express consent of the Executive Council, become the purchaser at any such foreclosure sale or be the first assignee of any such purchaser. It is further

expressly understood that the privileges, franchises and concessions granted under this ordinance and all rights and benefits accruing thereunder and all property interests and rights connected therewith may be assigned, sold, transferred or set over to the Porto Rico Railway, Light and Power Company, a corporation about to be organized for that purpose; but no other assignment thereof shall be valid until approved by the Executive Council. The People of Porto Rico may purchase or take the property of the grantee at a fair and reasonable valuation. No stock or bonds shall be issued by said grantee except in exchange for actual cash or property at a fair valuation equal in amount to the par value of the stock or bonds issued; nor shall stock or bond dividends be declared or paid. The rights, privileges and concessions herein granted shall be subject to amendment, alteration or repeal by the Executive Council.

Section 31. In case of any legislation modifying or altering the form of government for the island of Porto Rico, all the rights, privileges, duties and discretions herein reserved to the Executive Council shall be performed, exercised, executed and become the joint duties, privileges, rights and discretions of the governor and the heads of the several departments of government acting collectively, and by a majority vote; and in case of such modification or change by subsequent legislation the rights, duties, discretions and obligations reserved herein to the Commissioner of the Interior shall be performed by that officer of the insular government whose duties may most nearly correspond to the present duties of the Commissioner of the Interior.

Section 32. The term "railway" as herein used shall extend to and include the necessary roadbed, tracks, side tracks, switches, cuts, fills, embankments

and drainage canals, spurs, branch roads, overhead trolley and transmission lines, poles, wires, signal systems, dams, reservoirs, canals, pipe lines, sluices, waterways, power plants, bridges, ferries, wharves, stations, terminals, depots and buildings, and the appurtenances to the same, and each and every thing necessary to the complete enjoyment and exercise of all of the rights, privileges and concessions herein granted.

Section 33. This ordinance shall not be valid or become operative until approved by the President of the United States. And the grantee shall obtain his approval within sixty days from the date of the approval hereof by the Governor of Porto Rico.

Section 34. The franchise, privileges, concessions and rights herein granted shall be accepted by the grantee in writing and by executing a bond in favor of The People of Porto Rico, in the sum of one hundred thousand dollars satisfactory in form to the Attorney General and as to sufficiency to the Treasurer, and conditioned upon the full completion of the work herein authorized within three years after such acceptance and in accordance with the conditions herein contained, and in accordance with the plans and specifications therefor approved as herein provided; and conditioned also upon the payment by the grantee to The People of Porto Rico of any loss or damage or costs accruing against The People of Porto Rico by reason of the construction of the works herein authorized, at any time during the period of construction herein limited and before the completion thereof shall have been certified by the Commissioner of the Interior as in section 35 provided. Such written acceptance and bond shall be filed with the Executive Council within sixty days after this ordinance shall have been approved by the Governor of Porto Rico. Upon the approval and acceptance

of said bond, the sum of ten thousand dollars now on deposit with the Treasurer of Porto Rico as a guarantee of the acceptance by the grantee of this ordinance, shall be returned to the grantee.

Section 35. Upon the presentation of a certificate from the Commissioner of the Interior showing the completion of the work herein authorized, and upon the full compliance with the terms of this ordinance to the satisfaction of the Executive Council, and upon the full payment by the grantee of any loss, damage and costs accruing against The People of Porto Rico as in said bond provided, the said bond shall be cancelled and returned to the grantee.

Section 36. The duration of the franchise, privileges, concessions and rights herein granted shall be ninety-nine years from the date of the acceptance hereof as hereinbefore provided.

Section 37. It is understood and agreed that the essence of this ordinance is a grant to the Vandegrift Construction Company, its successors and assigns duly authorized under the terms hereof, of the right to construct, maintain and operate a railway line across the island, and that the grant of the right to distribute and sell electric light and power is incidental thereto and is made only for the purpose of enabling the said company to make the most economical use of its power plant constructed under the authority hereof. It is therefore expressly agreed that the grantee shall not distribute light or power until at least twenty-five kilometers of its proposed railway line are in actual operation.

Section 38. This ordinance when approved by the Governor and by the President, shall take effect immediately upon the acceptance by the grantee of the terms and conditions hereof as above provided.

Done in open session of the Executive Council of

Porto Rico on this the second day of March in the year of our Lord nineteen hundred and three.

CHAS. HARTZELL,

President of the Executive Council.

Approved this the third day of March, A. D., 1903.

W. H. HUNT,

Governor of Porto Rico.

Approved this the 21st day of March, A. D. 1903.

THEODORE ROOSEVELT,

President of the United States.

MR. HAND: We offer in evidence the acceptance of the Vandegrift Construction Company, dated April 24, 1903, of the terms of the ordinance just offered in evidence, as follows:

"Vandegrift Construction Company, a corporation duly organized and existing under the laws of the State of New Jersey, by Joseph A. Vandegrift, President, by virtue of the authority in him vested by resolution of the Board of Directors of the said corporation, hereby makes its formal acceptance of, and does accept the ordinance granting to the said Vandegrift Construction Company the right to build and operate a line of railway between the Municipality of San Juan and the Playa of Ponce in the Island of Porto Rico, and to develop electrical energy by water or other power for distribution and sale for railway, lighting and industrial purposes, which ordinance was granted by the Executive Council on the 2nd day of March, 1903, and approved by the Governor of Porto Rico on the 3rd day of March,

1903, and by the President of the United States on the 21st day of March, 1903.

San Juan, Porto Rico, April 24, 1903.

VANDEGRIFT CONSTRUCTION COMPANY,

By Joseph A. Vandegrift, President.

In the presence of

Jose R. F. Savage.

(Marked "Plaintiff's Exhibit C, November 3, 1909.")

MR. HAND: I offer in evidence authenticated copy, under the great seal of Porto Rico, of the minutes of the proceedings of the Executive Council of Porto Rico, on June 8, 1903, with regard to the acceptance of the bond tendered by the Vandegrift Construction Company, which has been offered in evidence.

MR. WARREN: We object to the offer on the ground that it is not authenticated as required by the act of Congress looking towards the introduction of it in Court; and second, because it embraces extraneous matters and hearsay declarations and assumptions of fact with reference to this matter not founded upon fact but incorporated in the alleged report of a committee that reported to this council at this meeting; this offer being an extract from the minutes of the proceedings; our third objection is that you cannot offer an extract from the minutes of any proceedings, it must be the minutes; and further because it is incompetent and immaterial to the question before the Court in this lawsuit.

THE COURT: What is the purpose of the offer?

MR. HAND: The purpose of the offer is to show that the filing of the bond by the defendant and by the Vandegrift Construction Company and its sureties was accepted as a sufficient compliance with the requirements of the franchise and of the ordinance extending the time for filing the bond.

JUDGE KELLY: We would like to add the further specific objection that this is not the best evidence of the fact sought to be proven by the offer.

THE COURT: I will overrule the objection. (Exception noted for defendant.)

(The extract from the minutes offered is marked "Plaintiff's Exhibit D, November 3, 1909.")

The extract is as follows:

Extract from the Minutes of the Proceedings of the Executive Council of Porto Rico on June 8, 1903.

"At two o'clock P. M. the Council met.

Upon the calling of the roll the following members appeared and answered to their names: Messrs. Barbosa, Guzman Benitez, Gomez Brioso, Crosas, Hartsell, Lindsay, Post, Willoughby. 8. Absent: Messrs. Matienzo Cintron, Elliott. 2.

The Committee on franchises, Privileges and Concessions submitted the following report:

That the Treasurer of Porto Rico has received the bond for \$100,000 filed by the Vandegrift Construction Company in accordance with section 34 of the ordinance granting to that company the privilege to construct an electric railway across the Island of Porto Rico and that such bond is satisfactory to the Treasurer with respect to its sufficiency and to the Attorney General as to its form; that the Vandegrift Construction Company and the Union Surety and Guaranty and Trust Company of Philadelphia, and the Title Guaranty and Trust Company of Scranton principal and sureties on the bond have filed in the office of the Secretary, designation of agents in the island upon whom service can be had and their consent to be sued, and that said companies are now perfecting the other steps required by law in respect to the Secretary's office; that by resolution of the Executive Council the time for filing the bond was extended to June 3, 1903; that the said bond was duly executed in the United States several days

prior to this date and the Treasurer of Porto Rico, as chairman of the Franchise Committee, was so informed by cable received May 29th, and that he in turn informed the President of the Executive Council of this fact.

The Committee recommended that the filing of the bond which has now been made and which is approved by the Attorney General and by the Treasurer of Porto Rico, be deemed a sufficient compliance with the requirements of the franchise and of the ordinance extending the time for the filing of the bond.

The report was adopted by the following vote:

In the affirmative were: Messrs. Barbosa, Guzman Benitez, Gomez Brioso, Crosas, Elliott, Hartzell, Lindsay, Post, Willoughby, 9. In the negative, 0. Absent, Mr. Matienzo Cintron, 1.

MR. HAND: I now offer in evidence authenticated copy, under the great seal of Porto Rico, of an ordinance amending ordinance granting to the Vandegrift Construction Company the right to build and operate a line of railway between the municipality of San Juan and the Playa of Ponce, etc., which is marked Plaintiff's Exhibit "E", November 3, 1909.

The purpose of the offer is to show that in accordance with the authority reserved in the original ordinance to the Executive Council to amend or alter the ordinance, the ordinance in question now offered in evidence was enacted extending the time for the completion of the work provided by the original ordinance to be finished within one year from the date of acceptance; and also amending the ordinance in other minor particulars and stating the terms upon which this extension of time was granted.

JUDGE KELLY: We object to the offer generally as incompetent, immaterial and irrelevant. We object specifically, first, because there is no proper authenti-

fication of this as a proper record in compliance with the requirements of the Act of Congress.

Second.—There is no acceptance shown of the terms of it by anyone.

Third.—It cannot affect the liability of the defendants in this suit because it purports to be a change of an original ordinance in pursuance of some clause contained in the original ordinance which provided for changes, which is void.

Fourth.—The original ordinance while it constitutes what we might call a contract between the People of Porto Rico and the Vandegrift Construction Company, does not constitute any contract between the People of Porto Rico and the Title Guaranty & Trust Company, and the Title Guaranty & Trust Company are not to be affected by the terms and conditions contained within it, except in the sense that the defendant undertook that certain work should be done within three years in accordance with the conditions of the original ordinance.

Fifth.—The ordinance which is now proposed to be offered in evidence constitutes a change in the contract between the original parties to the contract to the prejudice of the defendant company; the authority upon the bond upon which suit was brought, and it was therefore not only incompetent to affect the defendant adversely but it affirmatively shows that it has the effect of releasing the defendant here from its obligation as assumed in the bond sued upon.

Sixth.—There is nothing in the ordinance proposed to be offered showing any knowledge, much less acceptance of or acquiescence offered in the change purporting to be made by this ordinance offered on the part of the defendant company; that is to say, it is not either shown by the ordinance itself nor is it proposed to be shown otherwise that the defendant company had

knowledge of this change in the original contract, or that it accepted the change or acquiesced in it or agreed to it.

Seventh.—Section 5 of this ordinance as offered says it shall take effect immediately upon the acceptance by the grantee of the terms and conditions hereof as above provided, and there is no proof offered to be shown of any such acceptance.

MR. HAND: I now add to my offer that we propose to show that this ordinance was accepted by the grantee named in the ordinance, which covers either the Vandegrift Construction Company or its successors or assigns.

THE COURT: I will let the ordinance in, although I reserve my views of it until later. If it varies the contract and if that releases the sureties I don't think it is going to hurt the defendant very much to have it in. (Exception noted for the defendant.)

Plaintiff's Exhibit "E" is as follows:

"An ordinance amending 'An ordinance granting to the Vandegrift Construction Company, the right to build and operate a line of railway between the municipality of San Juan and the Playa of Ponce in the Island of Porto Rico, and to develop electric energy by water or other power for distribution and sale for railway, lighting and industrial purposes.'"

Be it ordained and enacted by the Executive Council of Porto Rico:

Section 1. Section 1 of 'An Ordinance granting to the Vandegrift Construction Company, the right to build and operate a line of railway between the municipality of San Juan and the Playa of Ponce in the Island of Porto Rico, and to develop electric energy by water or other power for distribution and sale for railway, lighting and industrial purposes,' heretofore

enacted by the Executive Council of Porto Rico and approved by the Governor of Porto Rico on the 3rd day of March, 1903, and by the President of the United States on the 21st day of March, 1903, is hereby amended by striking out all of that part of Section 1 of said ordinance beginning with the commencement of line 23 on page 2 thereof and continuing to and including the word 'council' in line 27 on page 2 of said ordinance.

Section 2. Section 15 of said ordinance is hereby amended so as to hereafter read as follows:

'Section 15. Before the first day of January, 1905, the grantee herein shall cause the road-bed of said railway to be completely graded between the Island of San Juan and the urban portion of the municipality of Caguas, and such number of men shall be employed in the prosecution of said work as shall be necessary to complete the same on or before the said first day of January, 1905; Provided that the number of men to be actually employed and engaged in the construction of said road on or before the seventh day of August, 1904, shall not be less than 250; and provided further, that the number of men engaged in the work of construction shall be increased beyond the number of 250 and up to the number of 500 men, or approximately that number, it being the intent and purpose of this ordinance to provide that as many men shall be engaged in said construction work within the dates specified, as are necessary to complete the same, without employing a larger force than can be advantageously engaged in said work; and provided further, that all employees, workmen, or laborers engaged in the construction of said work shall be paid weekly on such pay day as the grantee herein may select; and provided further, that this extension of time wherein to finish the construction work in this amendment described, is made with the express under-

standing that upon a failure of the grantee to comply with the terms and conditions herein set forth, the franchise granted to the Vandegrift Construction Company, approved by the Governor of Porto Rico, on the 3rd of March, 1903, may, at the option of the Executive Council of Porto Rico, be subject to immediate forfeiture. And the grantee hereof shall also cause the foundations and approaches of its proposed bridge across the body of water flowing through the Boqueron into the harbor of San Juan to be completed, and shall have contracted for the material necessary for the superstructure of such bridge before the said first day of January, 1905.'

Section 3. Section 18 of said ordinance is hereby amended by striking out of said section the words 'within one year from the date of the acceptance hereof as herein provided,' appearing in lines 22 and 23 on page 9 of said ordinance and substituting therefor the words 'before the first day of January, 1905,' and the said section is further amended by striking out the words 'within the same period,' appearing in line 24 on page 9 of said ordinance and substituting therefor the words 'before the first day of January, 1905.'

Section 4. Section 30 of the said ordinance is hereby amended by adding the words 'with the approval of the Governor of Porto Rico and of the President of the United States, and such amendment, alteration or repeal shall also be subject to the power of Congress to annul or modify the same,' after the word 'council' appearing in line 15 of page 18 of said ordinance.

Section 5. This ordinance when approved by the governor and by the President, shall take effect immediately upon the acceptance by the grantee of the terms and conditions hereof as above provided.

Done in open session of the Executive Council of

Porto Rico on this the seventh day of July, in the year of our Lord nineteen hundred and four.

CHAS. HARTZELL,
President of the Executive Council.

Approved this the 18th day of July, A. D. 1904.

BEEKMAN WINTHROP,
Governor of Porto Rico.

Approved this the second day of August, A. D. 1904.

THEODORE ROOSEVELT,
President of the United States."

By MR. HAND: I offer in evidence authenticated copy, under the great seal of Porto Rico, of the minutes of the proceedings of the Executive Council of Porto Rico on February 17, 1905, in relation to the repeal of this franchise, granted by the original ordinance already in evidence.

The purpose of the offer is to show the circumstances under which this ordinance was repealed, marked Plaintiff's Exhibit "F," November 3, 1909.

By MAJOR WARREN: This is objected to because it contains recitals apparently of an assignment of the Vandegrift Construction Company franchise from the Governor of Porto Rico to a new concern, namely, the Porto Rico Railway, Light and Power Company.

Second.—We object to it because by a recital and a resolution they propose here to offer the circumstance asserted of their withdrawal of the franchise to the Vandegrift Construction Company, namely, its failure to comply with the ordinance, and originally amended, by which it got its right to build this proposed road.

Third.—I object because it is not authenticated in a way to make it competent evidence for any purpose.

It is not material or relevant for any purpose to anything in this case.

By MR. HAND: I will withdraw the offer for the present. I now offer in evidence authenticated copy of certificate signed by the Vandegrift Construction Company declaring that by instrument bearing date the 12th day of September, 1903, it had assigned the privileges, franchises, grants, concessions and rights given and granted to it by the Executive Council of Porto Rico by an ordinance adopted by the Executive Council at the meeting on the 2nd day of March, 1903, entitled an ordinance granting to the Vandegrift Construction Company, the right to build and operate a line of railway, etc., dated April 20, 1904, which is marked Plaintiff's Exhibit "G".

By MAJOR WARREN: We object to this paper because it is not a duly authenticated document nor, assuming that it be such, is it the best way to establish or the legal way to establish the proof of the execution of an alleged assignment by the Vandegrift Construction Company to the Porto Rico Railway, Light and Power Company.

By THE COURT: I will admit the offer. (Exception noted for the defendant.)

Plaintiff's Exhibit G is as follows:

To the Honorable the Executive Council of Porto Rico:

Vandegrift Construction Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, hereby certifies that for value received it has bargained, sold, assigned, transferred, conveyed and set over unto Porto Rico Railway, Light & Power Company, a corporation organized and existing under and by virtue of the laws of the said state, all privileges, franchises, grants, concessions and rights given and granted to it by the Executive Council of Porto Rico, by an ordinance adopted by the said

Executive Council at a meeting thereof held on the 2nd day of March, A. D. 1903, entitled "An Ordinance granting to the Vandegrift Construction Company the right to build and operate a line of railway between the municipality of San Juan and the Playa of Ponce in the Island of Porto Rico and to develop electric energy by water or other power for distribution and sale for railway lighting and industrial purposes," and all rights and benefits accruing under the said ordinance and all property interests and rights connected therewith by instrument bearing date the 12th day of September, 1903.

In witness whereof, the said Vandegrift Construction Company has caused its corporate seal to be hereunto affixed, and the signature of its President to be set hereunto this 20th day of April, 1904.

VANDEGRIFT CONSTRUCTION COMPANY,

By J. N. VANDEGRIFT,
Vice President.

Attest:

HERBERT A. CLARKE,

Secretary.

(Seal of Vandegrift Construction Company.)

MR. HAND: We now renew the offer of plaintiff's Exhibit "F." This is to be followed by the ordinance referred to in the action of the Executive Council.

JUDGE KNAPP: We renew our objections to the offer.

(Court adjourned to 9.30 o'clock A. M. Nov. 4, 1909.)

(Now, 9.30 A. M. November 4, 1909, Court meets pursuant to adjournment.)

THE COURT: I will overrule the objection and admit the evidence. In so doing I do not intend to accept

the recitals in these minutes as evidence of the facts to which they refer. I simply admit this record to show the grounds upon which the Executive Council undertook to act, the representations made to them, if you please.

(Exception noted for defendant.)

Plaintiff's Exhibit F is as follows:

Extract from the Minutes of the Proceedings of the Executive Council of Porto Rico on February 17, 1905.

"At two o'clock P. M. the Council met.

On the calling of the roll the following members appeared and answered to their names: Messrs. Barbosa, Crosas, del Valle, Diaz, Elliott, Falkner, Post, Rockwell, Sanchez, Sweet, Willoughby, 11.

The Committee on Franchises, Privileges and Concessions, to which was referred the application of the (Vandegrift Construction Company) the Porto Rico Railway, Light and Power Company for amendments to sections 3 and 22 of their franchise, submitted the following report, including report of the proposition submitted to said committee by Mr. W. B. Strong on said franchise:

"Proceedings of the Committee on Franchises, Privileges and Concessions of the Executive Council, held at the office of the Attorney General, in San Juan, February 17, 1905.

"Present: Chairman, Willis Sweet; Mr. Falkner, Mr. Diaz, Mr. Elliott, Mr. Sanchez Morales.

"The chairman stated the object of the meeting to be to consider the proposition submitted by Mr. W. B. Strong, in connection with the amendments to the ordinance known as the franchise of the Vandegrift Construction Company, under the terms of which the insular government proposes to guarantee interest for ten years on bonds, all as appears in the proposition referred to.

"It was moved and seconded that the said propo-

sition tendered by Mr. Strong be rejected, and the motion was carried *viva voce*.

"The chairman then directed attention to the amendment to the Vandegrift franchise, known as Exhibit A, which is still pending before the committee, and it was then moved and seconded that the application for said amendments be rejected; and the said motion was carried.

"The following proceedings were then had with reference to the franchise proposed to be amended:

"Resolved, that the proposed amendments to the Vandegrift franchise known as Exhibit A, be and the same are hereby rejected; and the said motion carried.

"The chairman was further instructed to recommend to the Executive Council that the franchise heretofore granted to the Vandegrift Construction Company on the 3rd day of March, 1903, under the terms of which the said Vandegrift Construction Company was authorized to construct and operate an electric line of railway from the Municipality of San Juan to the Playa of Ponce with all of the amendments to the said franchise, or the modifications thereof, be and the same are hereby revoked and forfeited.

"Resolved, that the chairman be further instructed to report that the said resolution is based upon the fact that the said Vandegrift Construction Company, to whom said franchise was granted, has in each and every respect failed to comply with the terms of its said franchise or the amendments thereto, and that by reason thereof the said franchise, and all of its amendments and modifications are hereby repealed; and the Attorney General of Porto Rico is instructed to proceed against any and all sureties that may have been deposited by the said Vandegrift Construction Company, as a guaranty of the faithful performance of the terms and conditions thereof,

"And be it further resolved that all of said resolutions shall apply to any right, interest or claim in or to all rights vested in the said Vandegrift Construction Company, held by the Porto Rico Railway, Light and Power Company, by virtue of any assignment it may have or claim to have in any interest in or to the said Vandegrift franchise, or any privilege or grant thereunder.

"Resolved, that the proceedings of this meeting, together with the resolutions above set forth, be reported to the Executive Council with the recommendation that they do pass, and that the Attorney General be instructed to prepare an ordinance in accordance herewith.

"Which report was read and adopted, and the clerk directed to transmit a copy thereof to the Attorney General of Porto Rico for his information and guidance in drafting an annulling ordinance."

MR. HAND: We offer in evidence the ordinance so-called, repealing ordinance; to be followed by proof of the non-compliance with the terms of the original ordinance; being an authenticated copy of an ordinance repealing an ordinance granting to the Vandegrift Construction Company the right to build and operate a line of railway between the Municipality of San Juan and the Playa of Ponce in the Island of Porto Rico, and to develop electric energy by water or other power for distribution and sale for railway, lighting and industrial purposes.

JUDGE KELLY: It is objected to as immaterial, irrelevant and incompetent.

THE COURT: I will admit it.

(Exception noted for defendant.)

(The ordinance is marked "Plaintiff's Exhibit H, November 4, 1909.")

The ordinance is as follows:

"An ordinance repealing an ordinance granting to the Vandegrift Construction Company, the right to build and operate a line of railway between the Municipality of San Juan and the Playa of Ponce, in the Island of Porto Rico, and to develop electric energy by water or other power for distribution and sale for railway, lighting and industrial purposes.

Whereas, the Executive Council of Porto Rico granted to the Vandegrift Construction Company a franchise, privilege or concession, as above entitled, under the terms of which the said Vandegrift Construction Company was authorized and empowered to construct, maintain and operate a railway in Porto Rico for the conveyance of persons and property for hire from the Municipality of San Juan to the Playa of Ponce, and through intermediate points, which ordinance was approved by the Governor of Porto Rico on the 3rd day of March, 1903, and by the President of the United States on the 21st day of March, 1903; and

Whereas, the said ordinance was duly accepted by the said grantee on the 24th day of April, 1903; and

Whereas, section 15 of the said ordinance provided that within one year from the date of the acceptance of the said franchise, together with the terms and conditions thereof, the grantee should cause the roadbed of said railway to be completely graded between the Island of San Juan and the urban portion of the municipality of Caguas; and should also cause the foundations of its proposed bridge across the body of water through the Boqueron into the harbor of San Juan to be completed, and should have contracted for the material necessary for the superstructure of said bridge; and

Whereas, under the requirements of section 18 of said ordinance, and its acceptance thereof by the grantee the grantee agreed to build within one year

from the date of the acceptance of said ordinance a power dam at Comerio Falls; and

Whereas, the said grantee failed to do and perform the work and labor required by section 15 of said ordinance within the time specified therein; or to construct the power dam at Comerio Falls as the said grantee was required to construct the same by said section 18; or to do or perform the work and labor specified in sections 15 and 18 of said ordinance as by said sections the said grantee was required to do; and

Whereas, because of the failure of said grantee to do and perform the work and labor set forth and specified in said section 15 of said ordinance in accordance with the terms thereof, the Executive Council amended said franchise upon the petition of said grantee or its assignee, the Porto Rico Railway, Light and Power Company, by the terms of which amendment the time in which to do and perform the work and labor specified in section 15 of said ordinance was extended until the 1st day of January, 1905, and that the said amendment to said franchise being substantially a substitute for section 15, of the original grant contained the following proviso: "And provided further, that this extension of time wherein to finish the construction work in this amendment described, is made with the express understanding that upon a failure of the grantee to comply with the terms and conditions herein set forth, the franchise granted to the Vandegrift Construction Company, approved by the Governor of Porto Rico, on the 3rd day of March, 1903, may, at the option of the Executive Council of Porto Rico, be subject to immediate forfeiture," said franchise as amended was approved by the Governor of Porto Rico on the 18th day of July, 1904, and by the President of the United States on the 2nd day of August, 1904; and

Whereas, the said grantee, the Vandegrift Construction Company, or its assignee, the Porto Rico

Railway, Light and Power Company, has failed to do and perform the work and labor called for by section 15 of said ordinance as amended, and as by the acceptance of said amended franchise the said grantee or its assignee, the Porto Rico Railway, Light and Power Company, promised and agreed to do; and

Whereas, the said grantee or its assignee, the Porto Rico Railway, Light and Power Company, has in every respect failed to do and perform the work and labor required by section 18, of said franchise; and

Whereas, by the terms and conditions of said grant as the same was passed by the Executive Council of Porto Rico, and approved by the Governor of Porto Rico, and by the President of the United States, and accepted by the said grantee, the said franchise, privilege or concession, and all of the rights, grants or privileges thereunder or appertaining thereto, have been, and now are at the option of the Executive Council of Porto Rico subject to revocation, forfeiture or repeal;

Now, therefore, be it enacted by the Executive Council of Porto Rico:

Section 1. That the Ordinance entitled an ordinance granting to the Vandegrift Construction Company the right to build and operate a line of railway between the Municipality of San Juan and the Playa of Ponce, in the Island of Porto Rico, and to develop electric energy by water or other power for distribution and sale for railway, lighting and industrial purposes, approved by the Governor of Porto Rico on the 3rd day of March, 1903, and by the President of the United States on the 21st day of March, 1903, and any or all amendments thereto, be and the same are hereby repealed, the said ordinance, and the amendments thereto having been by the said grantee in all respects violated, and especially the provisions and requirements of section 18 of said franchise, and said grantee having failed to

comply with section 15 of said franchise as amended, each of said provisions being vital to the life of said grant; all of the rights, privileges or concessions appertaining or appurtenant thereto, are hereby revoked and forfeited to The People of Porto Rico as provided in section 15 as amended, and under the general provision of section 30 of said ordinance.

Section 2. All sureties or obligations of whatsoever character or kind heretofore given by the said grantee as a guaranty of the faithful performance of the obligations and conditions set forth in said ordinance are hereby declared forfeited to The People of Porto Rico to all and whatsoever extent the same shall be liable under the law.

Done in open session of the Executive Council held at San Juan in the Island of Porto Rico on this 24th day of February, A. D., 1905.

REGIS H. POST,
President of the Executive Council.

Approved this the 18th day of March, A. D., 1905.

BEEKMAN WINTHROP,
Governor of Porto Rico.

Approved this the 12th day of May, A. D., 1905.

THEODORE ROOSEVELT,
President of the United States.

MR. HAND: We offer in evidence an admission of counsel for the defendant of the following facts:

PLAINTIFF'S EXHIBIT "J".

Nov. 4, 1909.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA.

No. 66. Oct. Sessions, 1906.

The People of Porto Rico

v.

The Title Guaranty & Surety Company.

Now, October 30th, 1909, for the purposes of this case, it is admitted on the part of the defendant, subject to the right of defendant, to object to the admission of the same, in evidence on the ground that the facts are not material or relevant to the issue joined, as follows:

First.—That the three ordinances passed by the Executive Council of Porto Rico, relating to the franchise granted to the Vandegrift Construction Company, referred to in Plaintiff's statement, copies whereof are appended thereto and marked "Exhibits A, C, and D", were duly approved by Theodore Roosevelt, President of the United States, the first thereof on March 21, 1903, the second thereof on August 2, 1904, and the third thereof on May 12, 1905.

Second.—That The Title Guaranty & Surety Company was originally chartered under the laws of the State of Pennsylvania, under the corporate name of The Title Guaranty & Trust Company, of Scranton, Penna., and that its corporate name was in pursuance of the laws of the State of Pennsylvania, changed subsequent to the execution of the bond upon which the above suit is brought, to The Title Guaranty & Surety Company, to wit, on January 25, 1906.

Third.—That the defendant company was incorporated under the provisions of an act of the general assembly of the Commonwealth of Pennsylvania, approved April 29, 1874, entitled An act to provide for the incorporation and regulation of certain corporations, and the several supplements thereto, and particularly under the provisions of section 29, of said act, as amended by an act of the general assembly of the Commonwealth of Pennsylvania, approved the 9th day of May, A. D., 1889, (P. L. 159), whereby the said defendant company has among other powers and rights, the right to act as security for the faithful performance of any contract entered into with any person or municipal or other corporation, or with any state or government, by any person or persons, corporation or corporations. Letters patent were issued to the defendant company under its original corporate name by the Commonwealth of Pennsylvania, on the 20th day of February, A. D. 1901, and the articles of incorporation were duly filed and recorded in the office of the Recorder of Deeds in and for Lackawanna County, Pennsylvania, wherein the principal office and place of business of the defendant company was and is now located, on the 4th day of March, A. D., 1901.

(Signed) E. N. WILLARD,
Atty. for. Deft.

W. F. WILLOUGHBY, called for plaintiff and sworn.

DIRECT EXAMINATION.

By MR. HAND:

Q. Mr. Willoughby, what is your residence and present occupation?

A. I reside in Washington, D. C., and am assistant director of the census.

Q. State whether at any time you occupied any

position connected with the government of Porto Rico, and if so, when and what the position was?

A. From December, 1901, to July 1, 1907, I was treasurer of Porto Rico, and from July 1, 1907, to August 11, 1909, was secretary of Porto Rico.

Q. And president of the Executive Council?

A. Yes, sir.

Q. As a member of the Executive Council what committees were you on during that time?

A. I was on the committee on franchises and committee on finance, and several other minor committees.

Q. And during that time that you have stated you resided in Porto Rico?

A. San Juan, Porto Rico.

Q. What is the capital of Porto Rico?

A. San Juan.

Q. What is the next most important city in Porto Rico?

A. The Ponce, on the south coast.

Q. San Juan on the north coast?

A. On the north.

Q. Were you familiar with the matter of the grant of the franchise to the Vandegrift Construction Company to build an electric railway from the city of San Juan to the city of Ponce?

A. I was.

Q. In other words, those matters relating to that franchise come up while you were on the Executive Council, did they?

A. Yes, sir; I was a member of the Executive Council and of the committee on franchises during that entire time.

Q. Tell us about the distance from San Juan to Ponce?

A. The distance as followed by the military road is about eighty miles.

Q. Where is the city of San Juan located, is it

right connected with the main island or what is its situation?

A. The city of San Juan is located on what is really an island, but the southern part extends in the form of a narrow neck and adjoining the mainland intersected only by a narrow channel and crossed by a bridge.

Q. What is the body of water that is called the Boqueron, does that flow into San Juan harbor?

A. That I think is a small channel that flows into the upper end of San Juan harbor.

(The counsel for the plaintiff propose to show by the witness on the stand the character of the rights and franchises granted to the Vandegrift Construction Company by the original ordinance already in evidence in the case. Also we offer to show the great value and importance to the development of the island of these franchises and rights so granted. We also offer to show that the conditions relating to the prompt and continuous progress of the work and the several portions thereof contained in the ordinance and referred to in the bond were vital and essential conditions of the grant, for the reasons stated above.)

JUDGE KELLY: This offer is objected to as incompetent, irrelevant and immaterial. The first part of the offer is incompetent as well as immaterial and irrelevant because the conditions, &c., referred to in it are all set forth in writing in the ordinance, which constitutes the contract between the government of Porto Rico on the one side and the Vandegrift Construction Company on the other, and it is therefore not competent to either add to or take from them by oral testimony; and the testimony of the witness upon that branch could be nothing more or less than his judgment or opinion with reference to the character of the conditions, &c., referred to in the offer which are

clearly incompetent. The second part of the offer, which refers to the question of the value and importance of the franchise granted are entirely immaterial and irrelevant in this case, this being a suit upon the bond wherein it is claimed by the plaintiff that the principal in the bond failed to carry out the terms and conditions of it, so as to make the surety liable for damages. The third part of the offer with reference to the vital importance, &c., of the conditions contained in the ordinance is open to the same objection that we made to the first and second, namely, that the opinion of the witness can be of no value to the court and jury in passing upon the question that is at issue here, namely, whether or not there has been a failure to perform the condition of the bond sued upon, and it is incompetent, irrelevant and immaterial to get the opinion of the witness or to take from him any explanation as to the conditions of the ordinance, their importance or lack thereof.

THE COURT: I do not understand the purpose of the offer.

MR. HAND: The purpose of the offer is to give the court information as to the character of the franchise and rights granted by the ordinance, so that the court as a matter of law may have all the facts before it in order to determine whether the conditions of this ordinance were essential and vital as they are alleged to be, or not. The court is entitled to all the facts in order to enable it to determine what the purpose of this ordinance was, what the subject of it was, and therefore it has some bearing upon the importance of the conditions.

THE COURT: I think the real purpose of the offer is somewhat disguised by its terms. I do not see how you can suggest to the court the importance by oral testimony, but you are entitled to describe the grant,

the subject of the grant, and I think that is really what you mean.

MR. HAND: That is about what I mean except I think the court is entitled to know all the circumstances regarding the grant.

THE COURT: I think that is probably correct. I will allow you to give evidence descriptive of the subject of the grant.

By MR. HAND:

Q. Mr. Willoughby, you are acquainted with the proposed route in general along which this railway was to run, were you not, in the Island of Porto Rico?

A. Yes, sir; of course I never have been over the exact route that it surveyed, but I have been over all that country repeatedly.

Q. Will you tell us something about the town of Caguas near which the railway was to run; is that an important town or not?

JUDGE KELLY: We object to that as not material.

By THE COURT:

Q. How large is Caguas?

A. It is the most important interior city.

Q. How large is it?

A. It is of several thousand population, I should say it has a population of eight or ten thousand.

By MR. HAND:

Q. It is the center of what district?

A. Center of the tobacco district of the island.

Q. What about the city of Juana Diaz?

A. It is the first important town out the road from the Ponce end of the line and is a town of secondary importance.

Q. Certain water powers were granted in this original ordinance; will you tell us something about them?

A. The water power known as Comerio Falls is the most important water power that there is on the island, not only on account of the volume of water that passes that point, but on account of the contour of the land, which furnishes natural reservoirs by which, with comparative inexpensive damming the water can be stored and elevated.

Q. How about its vicinity to the city of San Juan with reference to utilization of that power?

A. It is some twenty miles, I should think, from San Juan, but the electric power has been generated at it and is now delivered in San Juan and generally over that section of the island.

Q. About the Rio de Loiza, what about that water power?

A. That water power I am not so familiar with that, but still not considered as valuable as that of Comerio.

MR. WARREN: We object to that.

THE COURT: The comparative character or importance of these by itself is of not much consequence to us without more. It is very little descriptive.

MR. HAND: Do you know anything about the extent of the water power at Comerio Falls, that is as regards the number of horse power possible to be developed there?

MR. WARREN: We object to that unless the witness is first shown to be competent.

MR. HAND: As a member of the franchise committee of the Executive Council did you have occasion to look into the value and importance of these water powers and other public rights belonging to Porto Rico?

MR. WARREN: We object to it as incompetent and immaterial.

THE COURT: You are now presenting your side of it, which is not quite what I accepted. Did he investigate as a member of the committee on water power?

By Mr. HAND:

Q. Did you investigate the extent of water power at Comerio Falls as a member of the franchise committee of the Executive Council?

A. I investigated it for the purpose of determining its general character as a water power, but not as an engineer for the purpose of determining precisely the quantity of horse power.

Q. You have traveled extensively over the island?

A. I have been all over the island.

Q. Will you tell us from your observation of the water power on the island whether the water power at Comerio Falls, that is what its importance is in relation to the other water powers?

Mr. WARREN: We object to that.

THE COURT: I have ruled upon that several times, and will now squarely meet it and sustain the objection.

Mr. HAND: Do you know about the commercial value of the water power at Comerio Falls?

JUDGE KELLY: We object to that for the same reason, immaterial and irrelevant, and the witness is not shown competent to express this opinion as an expert.

THE COURT: I will allow that question.

(Exception noted for defendant.)

By Mr. HAND:

Q. What is your answer?

A. Yes, sir; I know not as a matter of opinion but as a matter of fact that the Comerio water power develops power sufficient to practically run all of the electrical industries of the San Juan district, including the trolley lines and the electric light, not only for San Juan but the other towns of Rio Piedras, Bayamon and Carolina, and that power has only been partially developed, but has still furnished power sufficient to do that.

Q. That is at Comerio Falls?

A. Yes, sir.

Q. Has there been any development as yet of the power of the Rio de Loiza?

A. No, sir.

(The counsel for the plaintiff now offer to show by the witness that the grantee under the original ordinance did not comply with the provisions of the ordinance the conditions of the ordinance contained in sections 15 and 18, in that the road-bed between the island of San Juan and the urban portion of the municipality of Caguas was not completely graded within one year from the acceptance thereof by the grantee. Second, in that the foundations and approaches of the proposed bridge across water flowing from Boqueron into the harbor of San Juan was not completed within one year from the date of the acceptance of the ordinance. Third, in that the power dam at Comerio Falls was not completed within one year from the date of the acceptance of the ordinance.)

JUDGE KELLY: This is objected to as incompetent, irrelevant and immaterial for the reason that the defendant surety company did not undertake to guarantee that these things which they offer to show were not done within a year, should be done within a year, and that the doing of them within a year is not included within the contract entered into by the company, upon a breach of which they are here sued. Second; because these gentlemen must first show the plans and specifications which they say are a part of this alleged franchise, and which would determine not only the character of construction but affect the question of the portions which are to be first taken up and the portions that are to be completed and how they are to be completed, and they are an essential part of the contract because they enter into a cause for the delay as to the

first year's work in the particulars which the counsel criticises here as an occasion for default in the contract between the construction company and the government of Porto Rico; and the evidence is incompetent and immaterial.

(Court adjourned to 2 o'clock P. M.)

(Now 2 o'clock P. M. court meets pursuant to adjournment.)

MR. WARREN: I want to add a further objection to this offer: The offer being to show a non-compliance with the ordinance within a year as to certain things and within another year as to certain other things, and there being no offer to show that the conditions precedent to the starting of the work by the contractor were complied with or accomplished or done and effected, there is no date to start that year from, and we therefore add that as an objection to this offer now; and in support of that I cite the ordinance and certain provisions in it: First, by section 1 it is provided at the end of the first clause that the railway shall be built in accordance with a route to be subsequently prescribed in detail by the Executive Council; second, further along in that first section it says, "No part of said railway line shall be constructed or condemnation proceedings for a right of way therefor be instituted by the grantee until the exact location of that part of the proposed right of way shall have been approved by the Executive Council." This we contend required first the location of an exact route, and that agreeably to the Executive Council, and second, the preparation of plans and specifications agreeably to the Executive Council before the Vandegrift Construction Company could do any work, could start its work. Again, in section 14 of this ordinance it is provided that certain things shall be done and be approved of by the Com-

missioner of the Interior before the work of building the same shall proceed. Again, in section 20, it is provided that the grantee, the Vandegrift Construction Company, subject to the approval of the Commissioner of the Interior, and only upon the plans and specifications to be submitted to him for that purpose, shall have the right to do certain things in connection with the construction of this railway line, and in connection with the construction of that portion thereof of which complaint is now made or attempted to be made in this offer as to its failure of accomplishment within the time which they say the contract with the Vandegrift Construction Company called for its completion.

THE COURT: In one respect it does not matter which law applies to this contract, the common law of this country or the law of Porto Rico. Both laws agree that the contract is the law between the parties, and that that governs the right of each. It is as though under Porto Rican law, as I understand it, there were a special enactment to that effect, that the contract law has the force of a special law governing the parties in regard to the subject matter of it. That does not differ at all from the law as we have it here. What the parties have agreed to, that they are bound by. So that the first question is as to the construction of the contract, the natural construction, taking it as it reads. The argument recognizes also this, that while the bond is the obligation of the defendant company that there may be an obligation on the part of the principal broader than has been embodied in the bond. The contention on the part of the plaintiff, of course, is that by proper recitals and references the contract of the Vandegrift Construction Company with the People of Porto Rico as expressed in the ordinance is written into the bond and so becomes binding upon the defendant, but at the same time abstractly, as I understand it, the argument does recognize that the contract might be broad, it is not

necessarily made a part except as it is done so by the terms of the bond. And of course the contention of the defendant that the obligation of the Vandegrift Construction Company, the principal of the bond, is one thing, and the agreement in the part of the bond is the other. To that extent then the parties agree.

Looking to that condition of the bond it seems to me that this is the construction to be given to it: "Now therefore, the condition of this obligation is such that if the said principal shall within three years from the date of the acceptance by it of said ordinance fully complete the work therein authorized in accordance with the conditions therein contained and in accordance with the plans and specifications therefor approved as therein provided, then this obligation shall be void, otherwise to remain in full force and effect," I would read that this way: "If the said principal shall within three years from the date of the acceptance by it of said ordinance fully complete the work therein authorized, to wit, in accordance with the conditions therein contained and in accordance with the plans and specifications therefor approved as therein provided." To me that means this, not simply that the contract shall be completed within the three years limit, but that within that period the work shall progress in accordance with the terms and conditions expressed in the ordinance; that is to say, in that respect I sustain the contention of the plaintiff. It is true that the term for the entire completion is fixed at three years. That complies with the underlying ordinance under which the concession was given for building this road and the privileges conferred and the obligation the Vandegrift Construction Company entered into, the principal obligation. It seems to me it would stop considerably short not only of the purpose of the bond but of the terms of it to say that while the ordinance called for the work to progress in a certain way, a certain part of it to be done within

a year, if you please, and a certain other part to be done in two years, and so on progressively, that no obligation, no liability accrued under the bond if default was made in the work as it should progress provided only that within the three years the whole thing was fully completed. In other words, I think that this obligation was that the Vandegrift Construction Company, as it says, would complete the work in accordance with the conditions contained in the ordinance as well as in accordance with the plans and specifications approved.

It seems to me also, although it may not be necessary to rule this just at this point, that even though it should turn out that the Vandegrift Construction Company transferred its rights and its duties to the Porto Rico Electric Railway Company, that having been provided for in the ordinance, and so being in contemplation, and the obligation being that this work should be completed by the principal within that time, it did not relieve the surety if the principal put a substitute in the way provided for in the ordinance and that somebody else should take its place and go on with the work. If that work was not completed by reason of this, the obligation would accrue, the principal could not shift or shuffle off to the detriment of the People of Porto Rico and to the relief of the surety by transferring in this way to somebody else without at the same time undertaking that that party completed and complied as the original party was required.

Now when we come to determine the question as to whether this modification by the ordinance of July 17, 1904, in which the original provisions of the first ordinance were materially modified, we meet then the question whether there is a difference between the law of Porto Rico in this respect and the English or common law which governs in this state and forms a guide or rule of construction in the United States courts generally. It seems to me that there is a decided difference

between these two laws, notwithstanding the decisions which are quoted from Louisiana. It is to be noted there is no reference there to the code provisions, and even before it was suggested it seemed to me that I could detect in the decisions referred to an inclination to square themselves with the law as it prevails throughout the United States generally in disregard of the Code of Napoleon that had come down to them by reason of their French ancestry. Therefore the better guide is the Spanish law, the natural parent of the law of Porto Rico, and in the construction of the civil law, as I understand it, writers of authority are looked to, those who have made a study of the subject and written learnedly upon it, and according to the construction which their theory as well as by the terms of the code, itself, a surety can only be released where there is what constitutes a novation; that is to say, a new or substituted contract, materially different in its terms from that which it has superseded, not a mere modification of it. The substance of the original contract being adhered to would not constitute a novation, and that is all that we have here. Under the law of the United States of course, except as there was some express provision in the contract allowing of so broad a change, amendment or alteration, such a change as we have brought in here by way of the amendment in the ordinance of July, 1904, would entirely release the surety, and then that brings up the question of two laws being at variance, which is to be applied. If the common English law, the law of the United States, is the one, then the evidence that is offered is immaterial, the surety was released by the change which has been put in evidence, and that would be the end of it, if I may say so. But on the other hand, if the law of Porto Rico, as construed by reference to the authorities of the Spanish and civil law generally, is to be followed, then there is no such material change, no such substitution or super-

ceding of the original contract by a change in the terms of it in this way as would relieve the surety. Before passing upon that point I think we need more light. I need squarely to understand what is the position of the counsel for the defendant. If they concede that the law of Porto Rico prevails and governs the contract, which they may not be inclined to do after this suggestion, I ought to know it. I will overrule the objection.
(Exception noted for defendant.)

W. F. WILLOUGHBY, recalled for plaintiff.

DIRECT EXAMINATION.

MR. HAND: Mr. Willoughby, I call your attention to the provision of the so-called original ordinance, that within one year from the date of such acceptance hereof the grantee shall cause the roadbed of said railway to be completely graded between the Island of San Juan and the urban portion of the municipality of Caguas. Will you state whether to your knowledge that work was done, has ever been done by the Vandegrift Construction Company down to the time of your leaving the island?

JUDGE WILLARD: I object to the question as irrelevant to the issue being tried.

THE COURT: That virtually was the objection that I overruled.

By MR. HAND:

Q. What is your answer?

A. No, sir; that work had never been done when I left the island in July.

Q. Was it ever done by the grantee under this ordinance, or done by anyone under this ordinance?

A. No, sir; it never has been done.

Q. I ask you whether the foundations and approaches of the proposed bridge of the Vandegrift

Construction Company, its successors and assigns, across the body of water flowing through the Boqueron into the harbor of San Juan was ever completed down to the time that you left the island?

A. No, sir; it was not completed.

JUDGE WILLARD: I object to that way of asking a question as leading.

THE COURT: This is for the purpose of negation and there is no objection therefore to its being framed in the way it is. It follows the terms of the contract. The question is with regard to the compliance or performance of the terms of the contract and the terms of the contract are put into the question properly.

By MR. HAND:

Q. I call your attention to the provision of section 18 of the original ordinance, and ask you whether the power dam at Comerio Falla, provided by this section to be completed within one year from the date of the acceptance of the ordinance, whether that power dam was ever completed by the Vandegrift Construction Company, its successors or assigns, down to the time you left the island in 1909?

A. I couldn't say of my personal knowledge.

Q. Turning back again to the question of the grading between San Juan and Caguas, can you tell us what the distance from San Juan to Caguas was about?

A. From twenty to twenty-two miles, I should say.

Q. Did you ever see any evidences of work of grading prior to the repeal of the original ordinance along the line of the road from San Juan to Caguas?

A. Yes, sir.

Q. How much?

A. I saw evidences that some excavation had been made of dirt cut out in some places and filled in in others.

Q. Taking the whole extent of the grade from San Juan to Caguas, out of the twenty-two miles how much at the time this ordinance was repealed had been completed?

A. I should say that not more than a mile or two. There might have been enough work done to mark out the line further but not more than a mile or two had been completed.

Q. Coming down to the time of the repeal of this ordinance in 1905, I ask you whether at the time the repealing ordinance was passed by the Executive Council, the Vandegrift Construction Company or its assignee, the Porto Rico Railway, Light and Power Company, was doing any work along the line of the proposed road?

A. No, they were doing no work at that time.

Q. What is the distance between Juana Diaz and Caguas?

A. Approximately fifty miles.

Q. What is the approximate distance between Juana Diaz and Ponce?

A. Ten or fifteen miles, I should think.

Q. And the whole length of the road was approximately how much from Playa of Ponce to San Juan?

A. Between eighty and ninety.

Q. At the time of the repeal of this ordinance were you the chairman of the committee on franchises or not?

A. I was a member of the committee.

Q. Of the franchise committee?

A. Yes, sir.

Q. With regard to the acceptance by the grantee, either by the Vandegrift Construction Company or the Porto Rico Railway, Light and Power Company of the amending ordinance, I ask you whether you have any knowledge of this on this point?

MR. WARREN: We object to that as incompetent, and we ask for an offer.

THE COURT: You must prove your acceptance in some acceptable way.

MR. HAND: We propose to show, the ordinance not providing that this acceptance should be in writing, that the Porto Rico Railway, Light and Power Company, the assignee under the terms of the original ordinance of the Vandegrift Construction Company, accepted the terms of this amendment and went on and endeavored to a certain extent to comply with the terms of the ordinance as amended. Further, that in the month of December, 1904, and January, they presented a petition for further amendments.

This is to show by parol and by the acts of the company an acceptance.

MR. WARREN: We object to that, and ask your honor to ask the counsel to tell us how they propose to prove the facts; in other words, what facts does he propose to offer upon which he is going to say that the Vandegrift Construction Company or its successor, the Railway Company, did accept by parol. If by parol it must have been done by some person.

THE COURT: I will sustain the objection. You don't offer to give facts.

MR. HAND: I propose to show they went on and endeavored to comply with the terms of this contract and presented a petition for further amendments subsequently.

THE COURT: The trouble with your offer is that you don't offer to prove facts.

MR. HAND: We propose to show by the witness on the stand that the amending ordinance was enacted in pursuance of a petition from the Porto Rico Railway, Light and Power Company requesting an extension of time within which to do the work provided to be done within one year from the date of the acceptance of the original ordinance; that subsequent to the enactment of the amending ordinance the assignee of the

original grantee, to wit, the Porto Rico Railway, Light and Power Company, went on and exercised the rights granted by the ordinance as amended, to wit, in relation to the construction of the railroad provided thereby, and that subsequently, to wit, about the month of December, 1904, they presented to the Executive Council of Porto Rico, a petition asking for other amendments to the ordinance. This for the purpose of showing an implied acceptance on the part of the Porto Rico Railway, Light and Power Company, the assignee of the original grantee, of the terms of the so-called amending ordinance.

MR. WARREN: We object to the offer and ask the counsel for plaintiff to let us see the petition which they propose to show by the witness. The offer is objected to as incompetent and immaterial generally and specifically because there was no right in the original ordinance, so-called, to permit of any amendment or alteration of its terms; that the statement in one of the sections thereof, giving to the legislative council the alleged right, was in violation of the laws of Porto Rico governing such council, and the effort to change the contract between the Vandegrift Construction Company and the Government of Porto Rico in such a way was illegal. We further object because this is an effort to show, so far as we can grasp it, that the Porto Rico Railway, Light and Power Company undertook to get a change in the contract it assumed as the assignee of the Vandegrift Construction Company, and any of its acts in connection therewith materially altering the contract that had been made with the Vandegrift Construction Company without this defendant's knowledge and consent cannot bind it, particularly in the absence of the knowledge or consent of the Vandegrift Construction Company, and as it has to do with matters which the legislative body could not do in the way which it is pretended they did by the paper offered in evidence

here. Further that the facts offered to be proven for the purpose of showing an acceptance do not and would not show an acceptance.

THE COURT: I will sustain the objection.

(Exception noted for plaintiff at whose request a bill is sealed.)

(Court adjourned to 9.30 A. M., November 5, 1909.)

(Now 9.30 A. M., November 5, 1909, Court meets pursuant to adjournment.)

MR. HAND: We ask leave to suspend the examination of Mr. Willoughby for a time.

J. A. VANDEGRIFT, called for plaintiff and sworn.

DIRECT EXAMINATION.

MR. HAND: The counsel for the plaintiff offers to prove by the witness on the stand the execution of the original paper of which an authenticated copy has already been offered in evidence under the seal of Porto Rico, marked "Exhibit G."

JUDGE KELLY: We object to this, first, because it is not an offer of the facts which they propose to prove by the witness, but a statement of a conclusion which they propose to ask the Court to draw from something or other that I suppose they are going to prove by the witness.

THE COURT: The offer is objectionable I think also further because it says it proposes to prove the execution of a paper already authenticated; I don't know of any paper that has been authenticated.

MR. HAND: I will withdraw that part of the offer.

MR. WARREN: We add to that objection that counsel cannot assume what he pretends to by this offer as a fact.

MR. HAND: I have the original paper here.

THE COURT: That is a different proposition entirely. Is there any objection to that?

MR. WARREN: The witness called is not the man who signed the paper.

MR. HAND: No, the president of the company executed it.

JUDGE KELLY: We object to his proving that paper because the paper is not competent, relevant or material to anything involved in the issue that is being tried. The most that it purports to be is a declaration on the part of a corporation, not a party to this suit, that a certain thing has been done. In other words, it is clear, plain hearsay testimony of the thing which he is trying to prove, to wit, an assignment.

THE COURT: I don't take it that way. It seems to me that this would be effective as an assignment if it were properly proved. If it began "Know all men by these presents that the Vandegrift Construction Company," etc., has assigned, we would have no doubt about it. The fact that it is addressed to the Honorable the Executive Council of Porto Rico would make little difference in that respect it strikes me. The assignment or conveyance assumes the form of a recital. It says that so and so has conveyed, bargained, sold, assigned and transferred; sometimes it says and does hereby convey, but an instrument of this kind proceeding from this source to the Executive Council, who were the parties to whom notice of the matter should be conveyed, it seems to me would be effective to convey regardless of whether it had previously conveyed or not. While it is true that it does recite in here that by an instrument bearing date the 12th day of September, 1903, this transfer had been made, yet I am inclined to feel that it assumes something more than a mere certificate of an act done and that as I have said it would

be effective to transfer and convey, particularly as that was provided for in the original contract and ordinance between the parties. I will allow the evidence.

(Exception noted for defendant.)

By Mr. HAND:

Q. Mr. Vandegrift, what position did you hold in the Vandegrift Construction in the years 1903 and 1904?

A. President.

Q. I show you a paper marked "Plaintiff's Exhibit K," and I ask you whose signature this is, purporting to be vice-president of the Vandegrift Construction Company?

A. I think it is J. N. Vandegrift.

Q. Who was J. N. Vandegrift?

A. He was vice-president of the company.

Q. And what relation to you?

A. Brother.

Q. And whose signature is that attesting the seal as secretary?

A. Herbert A. Clarke.

Q. Was he the secretary of the company?

A. Yes, sir.

Q. You are acquainted with the signatures of your brother and Mr. Clarke?

A. Yes, sir.

Q. Is that the seal of the Vandegrift Construction Company?

A. Yes, sir.

(The counsel for the plaintiff offer the instrument in evidence, marked "Plaintiff's Exhibit K.")

JUDGE KELLY: We object to it as immaterial, irrelevant and incompetent. For the further reason that it has not been proven to have been made by the authority of the Vandegrift Construction Company.

THE COURT: The affixing of the seal imports authority.

JUDGE KELLY: We object to it further because it does not purport to be an assignment by the Vandegrift Construction Company to the Porto Railway, Light and Power Company, but only purports to state that an assignment had been made by another paper bearing another date, to wit, the 12th of September, 1903, this paper bearing date the 20th of April, 1904. It is therefore not competent evidence of an assignment, but is a mere hearsay statement that an assignment had been made, and it is not the best evidence of the assignment, the best evidence being the paper referred to in this certificate or declaration.

THE COURT: If the exact time of the assignment was important the actual deed of conveyance which is there recited might have to be proved. It does not seem to me that it is.

JUDGE KELLY: I want to add to the objection that there is no authority shown or offered to be shown to the vice-president of the company to make this paper; in other words, no authority from the board of directors of the company.

THE COURT: As I have already said I understand the affixing of the seal imports authority.

(Exception noted for defendant.)

The paper offered, marked "Plaintiff's Exhibit K" is as follows:

"To the Honorable the Executive Council of Porto Rico:

"Vandegrift Construction Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, hereby certifies that for value received it has bargained, sold, assigned, transferred, conveyed and set over unto Porto Rico Railway, Light & Power Company, a corporation organized and existing

under and by virtue of the laws of said state, all the privileges, franchises, grants, concessions and rights given and granted to it by the Executive Council of Porto Rico by an ordinance adopted by the said Executive Council at a meeting thereof held on the 2nd day of March, A. D. 1903, entitled 'An ordinance granting to the Vandegrift Construction Company the right to build and operate a line of railway between the Municipality of San Juan and the Playa of Ponce, in the Island of Porto Rico, and to develop electric energy by water or other power for distribution and sale for railway, lighting and industrial purposes,' and all rights and benefits accruing under the said ordinance and all property interests and rights connected therewith by instrument bearing date the 12th day of September, 1903.

"In witness whereof, the said Vandegrift Construction Company has caused its corporate seal to be hereunto affixed, and the signature of its president to be set hereunto this 20th day of April, 1904.

"VANDEGRIFT CONSTRUCTION COMPANY,

(Seal)

"By J. N. Vandegrift, *Vice-President*.

"Attest: Herbert A. Clarke, *Secretary*."

MR. HAND: We offer to prove the execution of an assignment by the Vandegrift Construction Company, dated October 8, 1904, assigning to the Porto Rico Railway, Light and Power Company the privileges, franchises, rights, grants and concessions given and granted to the Vandegrift Construction Company by the Executive Council of Porto Rico, by an ordinance adopted by the Executive Council on the 7th day of July, 1904, amending the original grant or franchise to the Vandegrift Construction Company, adopted by the Executive Council, March 2, 1903.

JUDGE KELLY: We object to the proof of the execution of this paper because it is immaterial and irrelevant and incompetent to prove or tending to prove any fact material to the issue now before the Court.

THE COURT: The objection is overruled.
(Exception noted for defendant.)

By MR. HAND:

Q. I show you a paper marked "Plaintiff's Exhibit L;" is that your signature as president of the Vandegrift Construction Company?

A. Yes, sir.

Q. You were the president of the Vandegrift Construction Company, were you, at that time?

A. Yes, sir.

Q. To whom was this paper delivered?

JUDGE KELLY: We object to that as immaterial.

A. I don't remember to whom it was delivered.

MR. HAND: You remember that it was delivered to the Porto Rico Railway, Light and Power Company?

JUDGE KELLY: I object to that as immaterial and irrelevant.

THE COURT: Prove this paper first before you deliver it.

By JUDGE KELLY:

Q. Your company had a seal?

A. Yes, sir.

Q. A regular seal with an impression?

A. Yes, sir.

Q. In other words the impression on the paper last shown to you showed the seal of your company?

A. That is the seal of our company.

By MR. HAND:

Q. Did you acknowledge this instrument as president of the Vandegrift Construction Company?

A. I don't remember now whether I acknowledged it or not.

Q. There is a signature; who is that?

A. Ralph Rounds.

Q. Did you go before Ralph Rounds and acknowledge that paper?

A. I couldn't say that either.

Q. Who was Ralph Rounds?

A. He was an attorney and commissioner for Porto Rico; he is I suppose; he is an attorney in New York.

Q. Was he an attorney for the Porto Rico Light and Power Company and for the Vandegrift Construction Company?

JUDGE KELLY: We object to that as immaterial.

By MR. HAND:

Q. Isn't it a fact he acted as attorney for both companies?

A. His firm acted as attorney for both companies, yes, sir.

Q. Where was this acknowledgment taken?

JUDGE KELLY: The gentleman has said he don't remember.

By MR. HAND:

Q. Where were you when you signed that paper, October 8, 1904?

A. I don't know whether I was in New York or Philadelphia or where I was, it purports to have been taken in New York.

Q. Will you swear you didn't appear before Mr. Rounds and acknowledge that paper in New York on the 8th of October?

A. No, I will not swear I did or did not.

Q. Have you any way of refreshing your recollection as to where you were on the 8th of October, 1904?

A. Not here I have not, no, sir.

(The counsel for the plaintiff offers the paper in evidence.)

JUDGE KELLY: We object to the offer as incompetent, irrelevant and immaterial. There is no authority shown in the president of the company to execute the paper; and there is no offer to show any authority from

the company to the president to execute the paper. There is no seal of the company attached to this paper, which might be argued to give it prima facie authenticity. There is no certificate of the seal of the commissioner for Porto Rico upon or attached to the purporting acknowledgment of the paper; no certificate of the fact that Ralph S. Rounds was a commissioner for Porto Rico at the time. The paper is therefore incompetent and of no force and effect to the prejudice of this defendant in this issue.

THE COURT: I sustain the objection. That is to say to this extent: I think that you have got to prove the authority to execute.

MR. HAND: By what authority did you execute this paper?

JUDGE KELLY: We object to that as not competent; the only authority that could be given to this man as president of the company to execute the paper would necessarily be by some some sort of corporate action or by by-laws perhaps. It is therefore incompetent for them to show authority in this way.

MR. HAND: The evidence of the witness will show to what extent he had authority.

THE COURT: You are supposed to know before you ask the question.

MR. HAND: We offer to show by the witness that he had authority from the board of directors of the corporation to execute this paper.

JUDGE KELLY: We ask the gentleman to incorporate in his offer how he proposes to show that, whether by minutes of the board of directors or the mere say so of the witness.

MR. HAND: By showing the witness' authority as president of the company and his other acts as president ratified by the board, and that he was authorized as president of the company to make this assignment, inasmuch as the company had already executed the

assignment of the original franchise to the Porto Rico Railway, Light and Power Company, and that this was in furtherance of that assignment which has already been offered and received in evidence.

JUDGE KELLY: I renew the objection to the offer.

THE COURT: I sustain the objection.

(Exception noted for the plaintiff at whose request a bill is sealed.)

Plaintiff's Exhibit L," offered and rejected by the Court, is as follows:

"Know all men by these presents, that Vandegrift Construction Company, a New Jersey corporation, in consideration of one dollar to it in hand paid by Porto Rico Railway, Light & Power Company, a New Jersey corporation, and other valuable considerations, has bargained, sold, assigned, transferred, conveyed and set over, and does hereby bargain, sell assign, transfer, convey and set over, unto the said Porto Rico Railway, Light & Power Company, its successors and assigns, all the privileges, franchises, rights, grants and concessions given and granted to the said Vandegrift Construction Company by the Executive Council of Porto Rico, by an ordinance adopted by the said Executive Council at a meeting thereof held on the 7th day of July, A. D. 1904, amending a certain other ordinance adopted by the said Executive Council at a meeting thereof held on the 2nd day of March, A. D. 1903, and entitled 'An ordinance granting to the Vandegrift Construction Company the right to build and operate a line of railway between the Municipality of San Juan and the Playa of Ponce in the Island of Porto Rico and to develop electric energy by water or other power for distribution and sale for railway, lighting and industrial purposes,' and also all privileges, franchises, rights, grants and concessions given and granted to the said company by the said Executive Council by the said ordinance of March 2, 1903, as extended and modified by said ordinance of July, 1904, and all rights and privileges under said ordinance as extended and amended, and all property, interests and rights thereby granted or conveyed; and said Vandegrift Construction Company hereby

confirms, releases and grants to the said Porto Rico Railway, Light & Power Company full right and title in and to the said ordinance of March 2, 1903, and all rights, privileges and property granted thereby.

"To have and to hold all the said privileges, franchises, rights, grants, concessions and property unto the said Porto Rico Railway, Light & Power Company, its successors and assigns forever; subject, however, to the terms, conditions, agreements, stipulations and royalties in the said ordinances or any of them contained, to the observance and performance of all of which the said Porto Rico Railway, Light & Power Company is hereby obligated and bound.

"In witness whereof, the said Vandegrift Construction Company has caused its corporate seal to be hereunto affixed and these presents to be signed by its president this 8th day of October, 1904.

"VANDEGRIFT CONSTRUCTION COMPANY,

"By J. A. Vandegrift, *President*.

"STATE OF NEW YORK, } ss.:
"COUNTY OF NEW YORK. }

"On the 8th day of October, 1904, before me personally came Joseph A. Vandegrift, to me known, who being by me duly sworn, did depose and say that he resided in Philadelphia, Pennsylvania; that he is the president of the Vandegrift Construction Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

"RALPH S. ROUNDS,

"*Commissioner for Porto Rico.*"

(Seal of)
(Porto Rico)

Ralph S. Rounds,
Commissioner
for Porto Rico.

"NEW YORK COUNTY, } ss.:
"STATE OF NEW YORK. }

W. F. WILLOUGHBY recalled for plaintiff.

DIRECT EXAMINATION.

MR. HAND: I made an offer originally which your Honor said was objectionable in that we did not offer to prove facts in relation to the acceptance of this amending ordinance by the Porto Rico Railway, Light and Power Company. I then made an offer to show facts in connection with the granting of it. Your Honor will recall we got into a discussion as to the question of the assignment, whether the ordinance had in fact been assigned to the Porto Rico Railway, Light and Power Company. I now desire, in order to make it clear, to renew the offer which I made yesterday, proposing to show that the amending ordinance was enacted in pursuance of a petition from the Porto Rico Railway, Light and Power Company requesting an extension of time within which to have the work provided to be done within one year from the date of the acceptance of the original ordinance, the Porto Rico Railway, Light and Power Company being at that time the assignee of the original grantee under the original ordinance. That subsequent to the enactment of the amending ordinance the Porto Rico Railway, Light and Power Company went on and exercised the rights granted by the ordinance as amended, to wit, in relation to the construction of the railroad provided thereby, and that subsequently, to wit, about the month of December, 1904, they presented to the Executive Council of Porto Rico a petition asking for other amendments to the ordinance.

JUDGE KELLY: This is objected to as incompetent, irrelevant and immaterial. This is no offer of facts at all, but a statement of conclusions and is clearly incompetent in the way in which it is framed.

THE COURT: Why don't you introduce the petition?

MR. HAND: We propose to prove the petition by the witness. I propose to follow this by showing the petitions which were presented to the Executive Council by the Porto Rico Railway, Light & Power Company.

THE COURT: That is getting the cart before the horse. You want to show your petitions and prove those, and then show acts in pursuance of them.

MR. HAND: I withdraw the offer.

I propose to show by the witness that about the month of May, 1904, the Porto Rico Railway, Light and Power Company presented a petition to the Executive Council of Porto Rico making application for an amendment of the franchise assigned to it by the Vandegrift Construction Company, already in evidence.

MR. WARREN: We object to the offer because they cannot show that by a witness. Though he may be a member of the Executive Council he cannot undertake to prove the acts and proceedings of that Council by word of mouth and by parol here. We object to the offer as clearly incompetent and violative of all rules of evidence.

MR. HAND: The offer is now to show the presentation of the petition by the Porto Rico Railway, Light and Power Company.

MR. WARREN: By the witness; that is your offer.

THE COURT: Have you got any minutes that would show this?

MR. HAND: No.

THE COURT: The first step is to prove your petitions. I will allow that.

MR. WARREN: Then the offer is temporarily withdrawn? There is nothing in the offer about a petition.

MR. HAND: I will withdraw the witness for the present.

WALTER M. YEAGER, called for plaintiff and sworn.

DIRECT EXAMINATION.

MR. HAND: The counsel for the plaintiff offers to show by the witness on the stand that in the month of May, 1904, a petition was presented to the Executive Council of Porto Rico by the Porto Rico Railway, Light and Power Company, the assignee of the Vandegrift Construction Company, requesting amendments to the so-called original franchise to the Vandegrift Construction Company, already in evidence in this case.

MR. WARREN: We object to the offer as incompetent and immaterial.

THE COURT: What ability has Mr. Yeager to know about those facts?

MR. HAND: He is the vice-president of the company and signed the petition.

Q. What position did you hold, Mr. Yeager, in connection with the Porto Rico Railway, Light and Power Company in 1904, May?

A. I was vice-president.

Q. And were you in charge of their work in connection with the building of the railway subsequent to the assignment of the franchise by the Vandegrift Construction Company?

MR. WARREN: We object to the question as immaterial and incompetent.

By THE COURT:

Q. What position did you occupy?

A. The engineering end of the work was in charge of Mr. Belknap, I had general charge of the general business end of the enterprise.

MR. HAND: We now renew our offer.

THE COURT: Why don't you put that in his hand and ask him if that is his signature?

By MR. HAND:

Q. Is that your signature as vice president of the company?

A. Yes, sir.

MR. HAND: To whom did you present that petition?

MR. WARREN: We object to the question.

THE COURT: It comes back to the other matter; where is the authority? What authority did he have to act in this way?

MR. HAND: We are not bound to show a definite authority if the witness was in general charge of their business, and if we can show by other acts that the company ratified this and went on and exercised the rights granted by this amending ordinance.

THE COURT: Why don't you prove the authority which is the quickest way?

MR. HAND: By what authority did you sign that paper?

MR. WARREN: We object to the question as incompetent and we ask for an offer of facts, if they are going to try to show authority.

MR. HAND: Under what circumstances did you sign and present this petition to the Executive Council of Porto Rico?

MR. WARREN: We ask for an offer.

THE COURT: I won't require them to make an offer.

THE COURT: How did you come to draw up that paper and present it to the Council?

MR. WARREN: We object to the question of the Court. There is no proof that he did draw it up or had it drawn up.

THE COURT: I will allow the question.

(Exception noted for defendant.)

By MR. HAND:

Q. What is your answer?

A. I have just forgotten the detail leading up to this petition, but the matter was discussed with our attorneys in Porto Rico and this petition was decided upon and drawn.

Q. The petition was prepared by the attorneys for the company, Rounds, Dillingham & Savage?

A. Yes, sir.

Q. You executed the paper for the Porto Rico Light & Power Company?

MR. WARREN: I object to the question.

THE COURT: It shows that he did upon its face.
(Objection overruled.)

(Exception noted for defendant.)

By THE COURT:

Q. When you say that "we discussed it" whom do you mean?

A. One of our attorneys, Mr. Hunt, and myself. If I remember rightly the question of this amendment was taken up with the Philadelphia office by letter, I have just forgotten the details concerning that.

Q. With the Philadelphia office of the Porto Rico Company?

A. The Porto Rico Railway, Light and Power Company.

MR. WARREN: We would like to object to your Honor's questions upon the ground that they are incompetent.

THE COURT: Let an exception be noted.

(Exception noted for defendant.)

JUDGE WILLARD: May I ask the witness a question?

THE COURT: Not now.

MR. HAND: I now offer in evidence the petition marked "Plaintiff's Exhibit M."

THE COURT: You may cross-examine.

By JUDGE WILLARD:

Q. Did you have any authority from the board of directors of the Porto Rico Railway, Light and Power Company to execute that paper?

A. None that I ever remember of.

Q. Was it ever discussed in your board of directors?

A. Not by me.

Q. Or in your presence?

A. No, sir.

Q. And you had no authority from them to sign that paper?

A. No, sir.

JUDGE KELLY: We object to the paper going in evidence as incompetent, irrelevant and immaterial; there is no authority shown on the part of the witness to either sign or present the alleged petition, that is no authority from the corporation of which he was an officer; the paper is therefore of no validity as affecting the corporation and can be of no validity or effect here. This is not the way to prove its presentation to the Council.

MR. HAND: I would like to ask the witness another question.

Q. Who conducted the negotiations with the Executive Council of Porto Rico in 1904, and the first part of 1905, with reference to the franchise which the Porto Rico Railway, Light & Power Company held as assignee of the Vandegrift Construction Company, and with reference to the extension of time of the original ordinance for completing parts of the work; in other words, who was it on the ground there, who acted for the company in those matters?

JUDGE KELLY: That is objected to as not material.

THE COURT: I will allow the question.

(Exception noted for defendant.)

By MR. HAND:

Q. What is your answer?

A. I was.

THE COURT: I don't think you have sufficiently proved the authority of the witness to act.

MR. HAND: I propose to follow this evidence by proof that in pursuance of the application presented on

behalf of the Porto Rico Railway, Light & Power Company for the amendment to the original ordinance, that the company went on and did work by virtue of the terms of that amended ordinance, and subsequently presented another petition for additional amendments. This for the purpose of showing an implied ratification or a ratification by the corporation of the act of the witness in presenting the petition on behalf of the company.

JUDGE KELLY: We object to the paper going in evidence on the promise to follow.

MR. WARREN: We object to the offer specifically, first, because it assumes that the paper which was identified by the witness as having been signed by him and which under the question of the court, as I understand it, was presented by him, was the act of the Porto Rico Railway, Light and Power Company; the offer assumes that which is not established as a fact as yet. Second, the fact if proven that the assignee of the Vandegrift Construction Company continued to work, the time being still within the original ordinance, from the fact that the assignee of the Vandegrift Construction Company continued working after the date that it is now said this paper was presented, no inference can be drawn, as this offer says is to be drawn, and this offer says is to be proven, of a ratification by the company of the alleged petition and acceptance, and act as to the amended ordinance.

THE COURT: I will overrule the objection and admit the evidence on your offer of proof to follow.

(Exception noted for defendant.)

"The paper, marked 'Plaintiff's Exhibit M,' is as follows:

"In the matter of an ordinance granting to the Vandegrift Construction Company the right to build and operate a line of railway between the Municipality of San Juan and the Playa of Ponce,

in the Island of Porto Rico, and to develop electric energy by water or some other power for distribution and sale for railway, lighting and industrial purposes.

“To the Executive Council of Porto Rico.

“Your petitioner, the Porto Rico Railway, Light & Power Company, a corporation organized and existing under the laws of the State of New Jersey, respectfully shows unto the Executive Council of Porto Rico that by assignment in writing dated the 20th day of April, 1904, which has this day been filed with the Executive Council of Porto Rico, the Vandegrift Construction Company, the grantee of an ordinance granting to it the right to build and operate a railway between the Municipality of San Juan and the Playa of Ponce, in the Island of Porto Rico, and for other purposes, which was approved by the Executive Council of Porto Rico on the 2nd day of March, 1903, and approved by the Governor of Porto Rico and the President of the United States, assigned, transferred, conveyed and set over unto the said Porto Rico Railway, Light & Power Company all the privileges, franchises, grants, concessions and rights given and granted to it by the said ordinance, and all rights and benefits accruing thereunder, and all property, interests and rights connected therewith in accordance with section 30 of the said franchise.

“Your petitioner respectfully prays that the Executive Council of Porto Rico acting in pursuance of the right to amend the said ordinance, expressly reserved to the said Executive Council of Porto Rico, by section 30 of said ordinance do amend the said ordinance in the following particulars:

“1. By striking out all of that part of section 1 beginning with line 23, on page 2, to and including the word ‘council’ in line 27, on page 2, of said ordinance.

“2. By striking out of section 15 thereof the words ‘within one year from the date of the acceptance hereof’ in lines 13 and 14 of page 8, of

said ordinance, and substituting instead the words 'before the 1st day of January, 1905.'

"3. By striking out of section 18 thereof the words 'within one year of the date of the acceptance hereof as herein provided,' in lines 22 and 23, on page 9, of said ordinance, and substituting instead the words 'before the 1st day of January, 1905;,' and by striking out of said section 18 the words, 'within the same period' in line 24, on page 9, of said ordinance, and substituting instead the words 'before the said 1st day of January, 1905.'

"Respectfully submitted,

"PORTO RICO RAILWAY, LIGHT AND
POWER COMPANY,

"By Walter M. Yeager, Vice-President.

"San Juan, P. R., May 16, 1904."

MR. HAND: Subsequent to the passage of the amending ordinance which followed the presentation of this petition which you have testified to, did the Porto Rico Railway, Light & Power Company go on and do work along the line of the railway in Porto Rico?

MR. WARREN: We object to the question as incompetent.

MR. HAND: After you signed that paper it was presented to the Executive Council, was it not?

MR. WARREN: We object to the question as incompetent.

THE COURT: I will allow the evidence.

(Exception noted for defendant.)

MR. HAND: What is your answer?

By THE COURT:

Q. Did you present it?

A. Personally I did not.

Q. Were you present when it was presented?

A. I don't think I was; I don't remember that I

was.

By MR. HAND:

Q. To whom was the paper given by you?

A. I signed the paper and turned it over to Mr. Hunt, our attorney in Porto Rico.

Q. With what instructions?

MR. WARREN: I object to the question.

THE COURT: That doesn't matter.

MR. HAND: What was done after that to your knowledge?

MR. WARREN: We object to that because it enables the counsel to establish something that it seems to me ought not to be established in this way.

A. As to whether the paper was filed by me or Mr. Hunt at this time I am not able to say because I have forgotten the details. It might have been filed by me personally or by Mr. Hunt, but my impression is that I turned it over to Mr. Hunt and he I presume filed it.

By THE COURT:

Q. That is it may have been filed with Council by you or by him?

A. Yes, sir.

MR. HAND: You had some later hearings before the Executive Council with regard to this petition, did you not?

MR. WARREN: We object to the question.

THE COURT: You may ask the question.

(Exception noted for defendant.)

By MR. HAND:

Q. What is your answer?

A. Some hearings before the franchise committee of the Executive Council.

By THE COURT:

Q. When you were present?

A. Yes, sir.

Q. Was the petition there?

A. I presume so.

Q. And those hearings were with reference to this petition?

A. As I remember it they were.

MR. HAND: And it was subsequent to those hearings that the Executive Council passed the so-called amending ordinance?

MR. WARREN: We object to that as incompetent.

By THE COURT:

Q. Was this before the time when this ordinance was passed amending your franchise?

A. Before the original franchise?

By MR. HAND:

Q. Before the amendment of the franchise?

A. You mean this application was filed?

Q. Yes?

A. Yes, sir.

Q. And these hearings before the franchise committee?

A. Yes, sir.

MR. HAND: We now offer to show by the witness on the stand that in the month of December, 1904, or thereabouts, a second petition was presented to the Executive Council of Porto Rico on behalf of the Porto Rico Railway, Light and Power Company, requesting further amendments to the franchise in question held by the Porto Rico Railway, Light & Power Company, as assignee of the Vandegrift Construction Company.

JUDGE KELLY: This is objected to as incompetent, irrelevant and immaterial, and as not an offer to prove any facts but an offer to show conclusions.

MR. HAND: This is in connection with our offer made in connection with the offer of the preceding exhibit.

THE COURT: I will allow you to show that this

was presented to Council on behalf of the Porto Rico Company.

(Exception noted for defendant.)

By MR. HAND:

Q. Did you sign this petition, "Plaintiff's Exhibit No. 1?"

A. Yes, sir.

Q. With the seal of the Porto Rico Railway, Light & Power Company appended to it?

A. Yes, sir.

Q. And was this paper presented to the franchise committee of the Executive Council?

MR. WARREN: We object to the question as incompetent.

THE COURT: The objection is overruled. (Exception noted for defendant.)

By MR. HAND:

Q. What is your answer?

A. I think it was.

By THE COURT:

Q. When was it presented, if you can tell?

A. I don't remember the exact time it was presented.

By MR. HAND:

Q. Will this paper which I show you marked "Plaintiff's Exhibit O," refresh your recollection as to about the time?

A. It says on the back January, 1905. I presume it was about that time.

Q. Look at the date on the back?

A. Yes.

Q. Would that refresh your recollection as to about the date?

A. Yes, sir.

Q. What month then was it?

A. March. All I know it says December there. I presume December 10th.

Q. These papers that you have got in your hand I am trying to get the time those were presented to the Executive Council, and I ask you if Exhibit O refreshes your recollection as to about the time these papers marked "N-1" and "N" were presented?

A. They were presented I presume about the same time.

Q. Which would be about December 10, 1904?

A. Yes, sir.

The counsel for the plaintiff offer in evidence "Plaintiff's Exhibit N" and "Plaintiff's Exhibit N-1."

JUDGE KELLY: Before passing upon them we desire to cross-examine.

CROSS-EXAMINATION.

By JUDGE KELLY:

Q. You said you thought these papers handed to you were presented to the franchise committee of the Executive Council; is that correct?

A. Yes, sir.

By THE COURT:

Q. Which was it, to the franchise committee or the Executive Council?

A. The franchise committee.

By JUDGE KELLY:

Q. Of the Executive Council?

A. Yes, sir.

Q. Did you present them?

A. Indeed I don't remember whether I did or not.

Q. And when you say you think they were presented you are giving us simply your impression, are you?

A. Yes, sir.

Q. You can't testify that you saw anybody present them, can you?

A. I don't remember that I ever saw anyone present them.

Q. You can't testify that you presented them yourself?

A. No, sir.

Q. Or that you were present at any time when anyone presented them?

A. No, sir.

Q. And as you said a moment ago when you say you think they were presented you are giving simply the impression that is now in your mind that they were presented by somebody?

A. Yes, sir.

Q. But you can't testify that they were of your own knowledge?

A. No, sir; because I don't remember whether I presented them or not, or whether someone else presented them.

Q. You don't remember whether you presented them or were present and saw anybody else present them?

A. No, sir; I do not.

Q. This franchise committee was I presume composed of a number of the Executive Council?

A. Members of the Executive Council.

Q. How many members were there, I mean of the franchise committee?

A. I have forgotten; I think though there were five or six.

Q. You can't testify as to where they were when these papers were presented to them, if they were presented to them, can you?

A. No, sir. The franchise committee met sometimes in the Attorney General's office, in Porto Rico; as

a rule I believe it met in the Attorney General's office, but I don't know where they were meeting when these papers were presented.

Q. You can't testify that at the Attorney General's office or any other office when the franchise committee was in session that you presented these papers or that you saw anybody else present the papers, you have no recollection upon the subject?

A. I have no recollection that I presented them at all.

Q. Have you any recollection that you saw anybody else present them?

A. No, sir.

By MR. HAND:

Q. You do recollect that the papers were in the hands of the franchise committee when you had meetings with them, don't you, when the matter was discussed of the petition?

A. The matter was discussed; yes, sir.

Q. Of the petition?

A. Yes, sir.

Q. And that they certainly knew of the petition?

MR. WARREN: We object to the question.

A. I know some questions concerning an amendment to the franchise were discussed before the franchise committee, but whether or not they had these papers I don't know.

By JUDGE KELLY:

Q. The subject matter of the petition that has been shown to you was discussed with the franchise committee?

A. Yes, sir.

Q. The thing or things referred to in it were discussed?

A. Were discussed with the franchise committee.

Q. You can't testify that these papers that have

been shown you were ever in the possession of the franchise committee in your presence?

A. No, sir; I cannot.

MR. HAND: I offer to follow this evidence by proof that these papers were presented to the franchise committee and were discussed with Mr. Yeager.

JUDGE KELLY: We object to the offer of "Plaintiff's Exhibit N-1" and "Plaintiff's Exhibit N," as incompetent, irrelevant and immaterial; first, there being no proof that they were ever presented to the franchise committee at all; second, that we have no evidence of what the franchise committee was or how it was appointed or what authority it had or whether it should be considered or not be considered as representing the government of Porto Rico; there is no evidence that they were ever presented to the Executive Council at all, and the Executive Council being the body recognized not only by the law but by the original franchise as having authority upon this subject matter of these questions; there is no proof of any authority from the Vandegrift Construction Company for the presentation of this petition, nor is there any proof of any authority from the Porto Rico Railway, Light & Power Company for presentation of them. And finally, that they throw no light upon any issue that we have here to dispose of, at any rate; in other words, they show no materiality to the case; and they are therefore incompetent, irrelevant and immaterial.

THE COURT: I am afraid you lose sight a little of what we started out to prove. You offered your first petition; I admitted that upon the evidence that you said you proposed to follow it by. Then you presented this second petition, and that was following out your offer of proof. You haven't got yet evidence that this second petition was presented to the franchise committee or the Executive Council or the subject of action. You have lost sight of what you started out to show.

RE-DIRECT EXAMINATION.

By MR. HAND:

Q. After the passage of the amending ordinance in 1904, did the Porto Rico Railway, Light & Power Company go on and do any work in connection with the building of the railroad under the franchise?

JUDGE KELLY: I object to that as incompetent and immaterial, and involving a legal conclusion that they did it in pursuance of the amended ordinance.

THE COURT: Objection overruled.

By MR. HAND:

Q. What is your answer?

A. We continued the work after the amendment was granted, the same as we had before. We started work after the original franchise was granted.

Q. You did work after the amended ordinance?

A. We continued the work after the amendment was granted.

Q. Between that time and the time of the execution of this second petition, N-1?

MR. WARREN: We think that ought to be in evidence before such a question is asked.

THE COURT: Answer the question.

By MR. HAND:

Q. What is your answer?

A. I don't know what you are asking about.

Q. The second petition.

A. Applied for the amendment to the franchise?

Q. The second amendment.

A. You say what was done?

Q. Was work done between the time of the passage of the amending ordinance and the execution of this second petition?

A. There was work done, there were plans and specifications completed by the engineers, &c., there

was no actual grading carried on at that time, but we were not, you might say, ready for the grading before that period; the engineers were completing the plans and specifications before this amendment was asked for, and we were working under the franchise at the time the amendment was asked for, applied for or granted.

Q. You were working under it after, were you?

A. We were working under it after.

Q. And were you purchasing rights of way and doing any grading at all?

A. Yes, sir.

MR. HAND: I ask the privilege now of withdrawing the witness, having made the offer. Before the Court rules upon the offer of these papers, Exhibit N and Exhibit N-1, I ask the privilege of recalling Mr. Willoughby.

MR. WARREN: We would like to examine this witness now as to what he testified to.

THE COURT: Have you completed the evidence that you propose to prove by this witness?

MR. HAND: Yes, for the present.

THE COURT: You may cross-examine then.

CROSS-EXAMINATION.

By JUDGE KELLY:

Q. In other words, as I understand you, this Porto Rico company, of which you were the president?

A. Vice-president.

Q. After the original franchise was granted entered upon the ground and did some work?

A. Yes, sir.

Q. Consisting of grading?

A. No, there was no grading done. The first requirement of the franchise required us to make an exact survey of the line and file it with the Executive Council.

We started in to do that shortly after the franchise was granted, had two engineering parties in the field, and were pushing that end of the work as rapidly as we possibly could, and it was several months after that; or necessarily would have been several months before we would have been in a position to have done any grading of any kind.

Q. When did you begin to grade?

A. It was probably six or eight months after the franchise was granted, or probably a year after the original franchise was granted.

Q. In the meantime the survey of the right of way was being made, was it?

A. Yes, sir.

Q. Who had charge of the survey?

A. Mr. J. M. Belknap.

Q. The gentleman who is here in court?

A. Yes, sir.

Q. You had charge of the business end of it at that time, did you?

A. Yes, sir.

Q. And this work was being done by this Porto Rico Company?

A. Yes, sir.

Q. And the expense of it was paid by the Porto Rico Company?

A. Well, the West Indies Construction Company had been organized and had a contract, I believe, to build the railroad under a contract from the Porto Rico Railway, Light and Power Company.

Q. They were simply contractors of the Porto Rico Company?

A. Yes, sir; but the Porto Rico Railway, Light & Power Company owned the franchise.

Q. What was being done was being done at the Porto Rico Company's expense?

A. I swear I don't know whether it was the expense

of the Porto Rico Railway, Light & Power Company or the West Indies Construction Company.

Q. The West Indies Construction Company was the contracting company?

A. Yes, sir; organized, as I understand it, for the purpose of building that particular proposition.

Q. For the Porto Rico company?

A. For the Porto Rico company.

Q. It wasn't going to build it for the Porto Rico company for nothing?

A. No, sir. You asked me whether the Porto Rico company or the West Indies Company furnished the money, that I can't tell, but I presume the Porto Rico Company did.

Q. As a matter of fact this West Indies Construction Company was doing the work for the Porto Rico Railway Company?

A. Yes, sir.

Q. And if it furnished the cash to pay its men and its expenses, &c., it was reimbursed by the Porto Rico Company, either in cash or bonds or in some way satisfactory between the parties?

MR. HAND: We object to this because the witness has testified that he cannot tell who furnished the money.

THE COURT: There is a good deal better objection that it is not cross-examination.

By JUDGE KELLY:

Q. As I understand you, there was work being done on the ground before the amending ordinance was either petitioned for or passed?

MR. HAND: We object to that as not cross-examination.

THE COURT: It is proper cross-examination. Proceed.

By JUDGE KELLY:

Q. That is true?

A. There was a great deal of work done before this amendment was even thought of or applied for.

Q. Then there was an amendment passed and at the time it was passed, and at the time it was petitioned for, if it was petitioned for, work was being done?

A. Some parts of the work; I say the engineering, the engineers were completing some of their plans.

Q. And after the amending ordinance was passed the work that was being done at the time it was passed simply continued?

A. Yes, sir; and other work was taken on. That other work consisted of grading, purchasing of right of way, and the continuing of the actual location of the Caguas on the first twenty-three miles.

Q. In other words what the company did after the passage of the amending ordinance was simply to continue what it was doing before it was passed?

A. Yes, sir; as the different phases of the work would naturally come up, first the engineering, and then the plans and specifications, and then the grading, &c.

W. F. WILLOUGHBY, recalled for plaintiff.

DIRECT EXAMINATION.

By MR. HAND:

Q. Mr. Willoughby, you have testified that you were a member of the franchise committee of the Executive Council of Porto Rico in the years 1904 and '5?

A. Yes, sir.

Q. That was a committee appointed by the Executive Council?

By JUDGE KELLY:

We object to that as incompetent.

By THE COURT:

Q. It was a committee of the Executive Council, was it not, composed of the Executive Council?

A. Yes, sir.

By MR. HAND:

Q. To whom did they report?

A. To the Executive Council.

JUDGE KELLY: We object to that as hearsay and incompetent.

THE COURT: If we were going into the question of power of the Executive Committee probably your position would be correct, but inasmuch as we are simply going into the transaction and subsequent actions by the Council, I don't think we need stop over that.

(Exception noted for defendant.)

By MR. HAND:

Q. I show you paper marked "Plaintiff's Exhibit N" and "Plaintiff's Exhibit N-1," I ask you to state whether or not those papers were ever presented to the franchise committee of the Executive Council?

A. They were presented either to the franchise committee or directly to the Executive Council and by the Executive Council referred to the franchise committee.

By JUDGE KELLY:

Q. Are you speaking of your own knowledge, were you present when they were presented in that way or are you giving us your impression?

A. I know of my own knowledge that papers covering the subject matter of these petitions were presented, and that those papers were in the files of the Executive Council.

Q. Did you see anybody present them?

A. I may have and I may not.

Q. You can't swear that you did?

A. No, I can't swear that I did.

Q. And you have no personal knowledge of your own as to how they got in the files?

A. I know that those papers were presented, but I can't swear that I personally saw any particular paper presented.

Q. Therefore you can't swear you saw these papers presented?

A. I can't swear that I saw them physically presented.

Q. You can't swear that you saw them presented at all, physically or otherwise, can you?

A. I can swear that papers covering that point were presented because they came before the committee and were acted upon by the committee.

Q. You didn't see anybody present them?

A. I have answered that question.

Q. Have you any objection to answering it again?

A. None at all.

Q. Please answer it.

A. I can't swear that I personally saw that identical paper presented.

By MR. HAND:

Q. I ask you if these papers were in the files of the Executive Council?

JUDGE KELLY: We object to that as immaterial unless they got there from the Porto Rico Company, of which there is no proof yet.

THE COURT: I will allow the question.

(Exception noted for defendant.)

By MR. HAND:

Q. What is your answer?

A. Yes, sir; they were in the files of the Executive Council.

(The counsel for the plaintiff now offer in evidence "Plaintiff's Exhibit N" and "Plaintiff's Exhibit N-1.")

JUDGE KELLY: We object to them as immaterial and incompetent and irrelevant.

THE COURT: You asked Mr. Willoughby nothing in regard to the first petition.

MR. HAND: No, I did not, but I will.

THE COURT: The first petition which was presented was imperfectly proved because it lacked proof of authority to make it on the part of Mr. Vandegrift. It was admitted upon the offer to follow it by a ratification or acceptance of the ordinance which it brought about. The second petition is sufficiently authenticated, it not only is signed by Mr. Yeager as president or vice-president, or whatever he was, but it also bears the seal of the corporation, so that it is admissible upon that ground. There is also in my judgment sufficient evidence that it was presented to the Council as well as to the franchise committee. And also there is sufficient evidence that the first petition was before that committee. Mr. Yeager's testimony is sufficient to that effect; and certainly the testimony which we now have in regard to the second is abundant. It is testified by Mr. Willoughby that such a paper was before the committee as well as before the Council, as I understand him, and we have the minutes of the Council which were introduced yesterday or the day before referring to such an application, so that there is no difficulty upon that score. The only weakness is with regard to the first paper on which the amending ordinance is alleged to have been based. It seems to me under this evidence that the objection is not well taken to the reception of this petition, and I will therefore admit Exhibits N and N-1.

(Exception noted for defendant.)

The exhibits are as follows:

EXHIBIT N-1.

"In the Matter of an Ordinance granting to the Vandegrift Construction Company the right to build and operate a line of railway between the Municipality of San Juan and the Maya of Ponce, in the Island of Porto Rico, and to develop electric energy by water or other power for distribution and sale for railway, lighting and industrial purposes.

"To the Executive Council of Porto Rico.

"Your petitioner, the Porto Rico Railway, Light & Power Company, a corporation organized and existing under the laws of the State of New Jersey, the assignee of all the privileges, franchises, grants, concessions and rights conferred upon the Vandegrift Construction Company by virtue of a certain ordinance heretofore enacted by the Executive Council of Porto Rico and approved by the Governor of Porto Rico and the President of the United States, respectfully prays that the Executive Council of Porto Rico acting in pursuance of the right to amend said ordinance, expressly reserved to the Executive Council of Porto Rico in section 30 thereof, do amend the said ordinance in the following particulars:

"1. By striking out all of that portion of said ordinance comprised within the section thereof numbered 3, appearing on page 3, line 13 to 25, inclusive.

"2. By amending section 22 of said ordinance so that it shall hereafter read as follows: 'Section 22. The grantee may furnish electric light and power at all points along the line of its said railway and at any and all other places in the island of Porto Rico. The Executive Council reserves the right to regulate and from time to time to amend or alter the tariff of charges to be made by the grantee for the distribution and sale of electric light or power to private consumers; and before distributing light or power to private consumers

the grantee shall present a schedule of charges to the Executive Council for its approval. The Executive Council reserves the right, however, to require the grantee in the distribution and sale of the surplus electric energy developed on the Rio de Loiza and not needed in the operation of its said railway lines to give the preference to the municipality of San Juan over other private consumers to the extent of 100 horse power.

"Porto Rico Railway, Light & Power Company,
"By Walter M. Yeager, Vice-president."

(Seal)

EXHIBIT N.

"An Ordinance amending 'An ordinance granting to the Vandegrift Construction Company, the right to build and operate a line of railway between the Municipality of San Juan and the Playa of Ponce in the Island of Porto Rico, and to develop electric energy by water or other power for distribution and sale for railway, lighting and industrial purposes.'

"Be it ordained and enacted by the Executive Council of Porto Rico.

"Section 1. The ordinance, entitled 'An ordinance granting to the Vandegrift Construction Company the right to build and operate a line of railway between the municipality of San Juan and the Playa of Ponce, in the Island of Porto Rico, and to develop electric energy by water or other power for distribution and sale for railway, lighting and industrial purposes,' heretofore enacted by the Executive Council of Porto Rico and approved by the Governor of Porto Rico on the 3rd day of March, 1903, and by the President of the United States on the 21st day of March, 1903, is hereby amended by striking out all of that portion of said ordinance comprised within the section thereof

numbered 3, appearing on page 3, lines 13 to 25, inclusive.

"Section 2. Section 22 of said ordinance is hereby further amended so as to hereafter read as follows: 'Section 22. The grantee may furnish electric light and power at all points along the line of its said railway and at any and all other places in the island of Porto Rico. The Executive Council reserves the right to regulate and from time to time to amend or alter the tariff of charges to be made by the grantee for the distribution and sale of electric light or power to private consumers; and before distributing light or power to private consumers the grantee shall present a schedule of charges to the Executive Council for its approval. The Executive Council reserves the right, however, to require the grantee in the distribution and sale of the surplus electric energy developed on the Rio de Loiza and not needed in the operation of its said railway lines to give the preference to the municipality of San Juan over other private consumers to the extent of 100 horse power.' "

By MR. HAND:

Q. Mr. Willoughby, I ask you what was done to your knowledge with reference to the return of the ten thousand dollars which had been deposited by the Vandegrift Construction Company prior to the enactment of the original franchise in evidence in this case to the Vandegrift Construction Company, after the passage of the ordinance and the filing of the acceptance and bond?

JUDGE KELLY: We object to the question as not competent, first, it assumes a fact not proven yet, to wit, that the Vandegrift Construction Company deposited ten thousand dollars with the People of Porto Rico, and it cannot be proven in this off-hand manner. Second, it is entirely immaterial and irrelevant

whether there was ten thousand dollars deposited and if so what became of it, as far as any issue here is concerned.

MR. HAND: This is simply for the purpose of showing that the Executive Council complied with the provision in the ordinance which it was to comply with upon the compliance by the Vandegrift Construction Company with certain conditions.

THE COURT: Suppose you let them show they did not. I don't see that it is material at this stage of the case.

(Exception noted for the plaintiff at whose request a bill is sealed.)

By MR. HAND:

Q. I call your attention to the period after the so-called amending ordinance was passed. Will you tell me whether to your knowledge the Porto Rico Railway, Light & Power Company or anybody representing them or their employes did any work in connection with the franchise for building the railway from San Juan to Ponce, after the passage of the amending ordinance?

A. It would be impossible for me to specify exactly. I know that the company continued in the Island and apparently continued at work, because they continued to appear before the franchise committee and the Executive Council on matters that were constantly arising.

Q. With reference to this grading that you have spoken about, when was that done to your knowledge, was that after the passage of the amending ordinance?

A. I couldn't state positively whether it was or not, but it was about the time of the amending ordinance. Whether any of it was done before and then some after or all done after I couldn't state positively.

CROSS-EXAMINATION.

By JUDGE KELLY:

Q. When you say that the company continued to appear before the Executive Council of which you were a member and before the franchise committee of which I believe you were also a member, you mean that some officer or agent of the company appeared there, do you not?

A. Yes, sir.

Q. Could you give us the names of the gentlemen who did actually appear in their presence?

A. The whole matter of the Vandegrift franchise, as we term it, was before the Executive Council for a number of years, during which Mr. Vandegrift, Mr. Yeager and the firm of Rounds, Dillingham & Savage and Mr. Hunt I think connected with a firm of attorneys for them. Now one and now another would appear before the committee in one capacity or another, so it would be difficult for me to say at any particular time what particular individual appeared before the committee.

Q. But it would be some of those gentlemen whose names you have mentioned, either Mr. Vandegrift or Mr. Yeager or Mr. Hunt?

A. Yes, sir.

Q. And as you say the whole question had been up before your committee for some years before this original ordinance was passed?

A. No, not for some years before the original ordinance; it was before the committee in connection with the granting of the original ordinance, and then for a couple of years subsequent up to the final repeal of the ordinance covering a period of a number of years.

Q. The ordinance was passed early in 1903?

A. In 1903 some time.

Q. Was it for some months before that that these gentlemen appeared before the committee?

A. Yes, sir.

Q. With reference to the franchise they were trying to get?

A. Yes, sir; at that time Mr. Yeager was the leading applicant; if not the sole one at that time.

Q. And Mr. Yeager is the man who had sole charge apparently of the matter?

A. He is the man we would call the promoter; he was the one in the early stage seeking to get the franchise.

Q. He is the man that got the franchise, wasn't he?

A. I couldn't say for certain it was granted directly to him, and before the final grant he had gotten the Vandegrift people interested and the grant was made to the Vandegrift Construction Company or not.

Q. After that for a couple of years he also appeared from time to time with reference to the matter, did he?

A. Yes, sir.

Q. And Mr. Hunt appeared sometimes and sometimes Mr. Vandegrift, and discussed questions concerning the franchise and the building of the road and power plant, &c.?

A. Yes, sir.

Q. With you, I presume, sometimes?

A. Yes, sir.

Q. As a matter of the Executive Council?

A. Yes, sir.

Q. Have you ever been over the route of that proposed railroad?

A. I have been over the country between San Juan and Ponce to be covered, surveyed by the road report. Of course I haven't been over the exact route surveyed, but I have been over the route that was afterwards used by an electric railway which was subse-

quently constructed running from San Juan to Caguas, and which route I suppose must follow very closely the route that the Vandegrift road was perhaps to follow.

Q. Then you couldn't say that you were ever over the route of the proposed railroad mentioned in the original ordinance to the Vandegrift Construction Company, could you?

A. No, only over a part of it, not over the precise line.

Q. You did tell us the other day that you investigated the water power; will you tell us what you mean when you say you investigated the water power?

A. Yes, sir; when I first went to Porto Rico and was appointed on the franchise committee it soon developed that the most important water power on the island was that known as the Comerio Water Falls. The committee had appearing before it constantly one applicant or another wanting to get concessions in relation to this water power. As a result the committee on franchises had appearing before it party after party making statements relative to that power. I was familiar with the stream, and although not an engineer necessarily looked into the matter so as to get an idea of the importance of the franchise that was being applied for.

Q. Certain rights, with reference to the Comerio Falls water power had already been granted to some other person or persons or company shortly before this original franchise was granted?

MR. HAND: We object to that as entirely immaterial and irrelevant and not cross-examination.

THE COURT: I suppose if that was the only question it would not be objectionable, but followed out it might not be as cross-examination. If you just want to ask him that question you may do so.

By JUDGE KELLY:

Q. What is your answer?

A. I think a franchise had been granted but had been revoked.

Q. You testified I think yesterday or the day before that no work had been done by the Vandegrift Company or the Porto Rico Company with respect to this water power, did you not?

A. No, sir.

Q. You said you couldn't testify with reference to the water power?

A. With reference to the water power.

Q. You did testify that the grading had been done to certain points mentioned in the ordinance?

A. Yes, sir.

Q. You were on the ground, were you, you were on the route of the railroad proposed to be constructed, and it was required to be graded between two points within a year under the terms of the ordinance; you went over the route and saw it wasn't graded?

A. I went over a part of the route; part of it is visible from the main road.

Q. Then you could see part of it without?

A. Without making any special trip.

Q. And you did as a matter of fact see that the grading was not done?

A. At that part I did as a matter of fact see that some part of the grading had been done.

Q. Could you see how far the grading had been extended without making a trip specially?

A. No, sir; I could not.

Q. And you didn't make the special trip, did you?

A. No, sir.

Q. Therefore you don't know how far the grading did extend, do you?

A. Of personal knowledge I don't know.

Q. You can't say of your own personal knowledge

that the grading called for in the original ordinance was not done can you?

A. Well, I have been at the other end, the Caguas end, and I saw no evidence of grading there. Of course I can't say that there might not have been grading done behind some hill that I didn't see.

Q. You didn't go over the route to see what had been done?

A. No, sir.

Q. Therefore you don't know what was done or what was not done on the route?

A. Not in any detailed way.

Q. Well, in any general way, do you know of your own knowledge?

A. No, I only know that part of the route that I have seen.

Q. And at one end of the route, to wit, at San Juan, the grading began, didn't it?

A. No, at Rio Piedras, a little outside of San Juan.

Q. And extended as far as your eye reached?

A. Yes, sir.

Q. Did you examine the boundary line of Caguas, the other end of this part of the route that had to be graded under the terms of the ordinance, to see whether any grading had been done to the boundary line?

A. I made no examination for that purpose, but I have been around Caguas and saw no evidence of grading there.

Q. Have you been on the boundary line?

A. I wouldn't say the boundary line, but I have been around the town pretty generally.

Q. Whether or not you can testify, you can swear of your own knowledge that there was not grading up to the town of Caguas?

A. No, because there might have been, just relying upon my own knowledge there might have been some point I didn't see, although I think I saw every point

at which a railroad would be apt to enter the town of Caguas coming from the direction of San Juan.

Q. Did you know the point at Caguas where the railroad was supposed to enter?

A. Yes, sir.

Q. Did you ever see the plans and specifications or the survey route or the map or plan of the route?

A. I have seen them but I have never examined them.

Q. Are they here?

A. I think they are.

Q. The plans and specifications for this railroad?

A. No, I think just simply a location for the route, but in such a way that I doubt if it would show it in relation to the contour so as to be able to identify it with the particular points along the route.

Q. There were plans and specifications, were there not, for the route on file with you?

A. I don't think they were what you would technically call plans and specifications; there was a survey of the route, a location.

Q. You say you don't know of any technical plans and specifications?

A. Of my own personal knowledge; all I know of is what I would call a mere engineering location of the route, but no plans or specifications in relation to the construction of the road.

Q. Nothing that would show the cuts and fills and bridges?

A. No, of my own knowledge I know nothing of that.

Q. When you said in answer to Mr. Hand that the Porto Rico Company kept on working after the amendment to the original ordinance, I think that is what you said, that they continued as they were working immediately before the amendment?

A. I don't think I stated exactly that; I know there

was some work of grading being done at that time, but whether it was all done immediately before or immediately after, if you would want my best recollection I can give that.

Q. You may.

A. My best recollection is that work was done in the way of grading after the amendment ordinance.

Q. And is it your best recollection that work was done in the way of grading before the amendment; in other words, wasn't some of the work done before the amendment and some after, and wasn't the work done after a mere continuation of the work being done immediately before and at the time of the amendment?

A. My best recollection is that the applicant got together some money to do some grading in order to bolster up a petition for an amendment.

MR. WARREN: We ask that the answer be stricken out.

THE COURT: Let it be stricken out.

By JUDGE KELLY:

Q. I am merely asking you the fact about this question of grading.

A. My recollection is that there was some grading done before.

Q. And some after?

A. And some after.

Q. And the grading that was done after was a continuation of the grading that started before?

A. Of course if it was different—I suppose it was a continuation.

Q. Supposing you were grading that street, beginning last Monday at that corner, and finishing next Saturday night, at that corner, we will assume that the corner over there represents the work that was being done by way of grading before the ordinance was passed, wasn't it a continuous job from the time it be-

gan until the time it ended, and in the meantime wasn't this amendment passed?

A. I would answer yes, probably, although it is usual in railroads to split up grading work into separate contracts, and have one contractor work in one part of the road and another contractor in another, so in that sense if there was grading done afterwards it might have been on a separate contract and could not have been a continuation of the other; as regards that I don't know.

Q. However, that might have been the work of grading, according to your best recollection, begun before the amendment was passed and it was carried on perhaps not continuously and contiguously along the line, but it was being carried on either continuously along the line, or at different points along the line at the very time that the amendment was passed.

A. That is my best recollection.

Q. When you say the Porto Rico Company continued to do work or did do work on the ground after the amendment was passed, what do you base that upon, why do you say the Porto Rico Company? It was men and tools and possibly horses or mules and things of that kind that were being used in doing the work, of course; isn't that so?

A. Yes, sir.

Q. Why do you say it was the Porto Rico Railway doing the work?

A. I will modify that and say the work was being done for the Porto Rico Company in its enterprise.

Q. You don't know by whom it was being done?

A. No, my best recollection is there was a contractor doing the work for them.

Q. Why do you say he was doing the work for them?

A. He is the only man—he wasn't doing it for himself.

Q. That is your conclusion, isn't it?

A. That is my conclusion.

Q. You didn't see any contract?

A. No.

Q. You can't swear that the work was done either by or for the Porto Rico Company, can you, of your own personal knowledge?

A. I can say of my own personal knowledge that work was being done along that route.

Q. That is all you can say of your own personal knowledge, isn't it?

A. Yes, sir.

Q. Have you any knowledge of any difficulties that were encountered by the parties who actually undertook the work of construction upon the ground?

MR. HAND: We object to that as immaterial and irrelevant.

THE COURT: Do you mean it is not cross examination?

MR. HAND: Yes.

THE COURT: I don't think it is cross examination. I will sustain the objection.

(Exception noted for defendant.)

By JUDGE KELLY:

Q. Do you know of interruptions from the time work was begun upon the ground?

MR. HAND: I object to that as immaterial and irrelevant.

THE COURT: I think it is relevant on the ground that it may bear as to the effect the work which you claim was a ratification.

(Exception noted for plaintiff at whose request a bill is sealed.)

By JUDGE KELLY:

Q. In other words, you know, although you can't remember the date, that at certain times, some time after the original ordinance was passed, that the work upon the ground began?

A. Yes, sir.

Q. And do you not also know that there were some interruptions?

A. Yes, sir.

Q. And can't you tell us how long after the first work began before the first interruption came?

A. The first work of course was that of putting surveying parties in the field, and my recollection would be that the surveying party worked fairly persistently if not continuously until the route had been located and the plans showing the location of the route had been filed. My recollection would then be that there was an interruption, that the actual work of construction did not begin as promptly as it might have been, or that it didn't follow up the location of the route, and in that sense there was an interruption between the survey work and the construction work.

Q. How long was that?

A. I couldn't approximate that.

Q. Do you know of any interruptions after the work of construction began?

A. I know that after the work of construction began there was trouble relative to the payment for the work that was being done, and my recollection would be that there were frequent interruptions in one way or another on account of that financial trouble.

Q. Did you know of any interruptions on account of anything else?

A. No, sir.

Q. Did you not hear of any other interruptions

besides those that were on account of the pay for the work?

A. No, sir.

Q. Didn't you hear of the men being arrested for working upon the job?

A. No, sir.

Q. Didn't you hear of rival claimants to the franchises or part of the franchises?

A. Not interrupting the work in any way.

Q. You did hear of the rival claims, did you?

A. I don't think it was at that period of the game. I do not know at the early period during the time the franchise was granted that there were rival claimants.

Q. Do you know a man named Raymond Valdez?

A. Yes, sir.

Q. You knew that he made a claim against these people for part of the franchise, don't you?

MR. HAND: We objected to this for the reason that the ordinance expressly stated what would be an excuse for the grantee in the progress of this work, in section 18, and this is not cross-examination.

THE COURT: That is a good objection.

RE-DIRECT EXAMINATION.

By MR. HAND:

Q. I would like to ask you whether in your conversations, in the conversations between you and the gentlemen whom you have spoken of, who represented the Porto Rico Railway, Light & Power Company, Mr. Yeager and Mr. Vandegrift, and Rounds, Dillingham & Savage, subsequent to the passage of the amending ordinance, whether anything was said by them with reference to the work that was being done along the line of this railway and for whom and by whom the work was being carried on?

JUDGE KELLY: That is objected to as incompetent, irrelevant and immaterial.

THE COURT: You want to show that they said work was being done by the company?

MR. HAND: Yes, sir; and asked for the amendments upon that ground.

THE COURT: I will allow that.

(Exception noted for defendant.)

By MR. HAND:

Q. What is your answer.

A. I can only reply to that by saying that up to the final repeal of the ordinance the officers or representatives of the company—I did see them constantly about the work, in which they were urging what they were doing and what they expected to do, but my recollection would not go beyond the fact that I did have those constant conversations with them.

Q. That is that as members of the franchise committee, that the franchise committee—

A. The representatives of the company would appear formally before the franchise committee or they would frequently come and see us individually as members of the committee.

Q. They did both?

A. They did both.

RE-CROSS EXAMINATION.

By JUDGE KELLY:

Q. They asked for further concessions and extensions, did they?

A. Yes, sir.

Q. And they told you of the difficulties that they had encountered, didn't they?

A. In financing? Their chief difficulty apparently was that of financing, getting funds to carry the enterprise along.

Q. I am asking you in reference to what they told you?

A. They told me that their difficulties were in securing funds.

Q. Didn't they tell you that their men had been arrested and taken off the work at different times by rival claimants to the franchise or part of it that had been granted to them, didn't any of them tell you that?

A. No, sir; I have no recollection of any such statement or conversation.

Q. Didn't they tell you that Raymond Valdez claimed the rights to the Comerio Falls and that he caused their men to be arrested when they attempted to do work with reference to water power?

A. I have no recollection of such a statement.

Q. Will you swear no one told you anything about that?

A. I will swear that I have no recollection that anyone told me that.

Q. That is as far as you will go upon that proposition?

A. I think that it is as far as any man can go with reference to any statement.

Q. It is as far as you will go?

A. Yes, sir.

Q. You are testifying now as far as your recollection goes you never had heard of such difficulties as that being talked of?

A. Yes, sir.

Q. Never anything of the kind?

A. I never heard anything of the kind.

Q. They didn't tell you that there had been lawsuits brought against them and injunctions brought against them to restrain them from doing work?

A. I have no recollection of it, although I know in the early period, a couple of years ago at the time that there was so-to-speak rival applicants for the

franchise; that Raymond Valdez himself wanted it, and an applicant wanted it. I do know that there were those rival claimants at that time, two years ago.

Q. I am talking about the time that elapsed after the franchise was granted to the Vandegrift Construction Company; weren't you told by these gentlemen, some of them, and didn't they or some of them tell the committee of which you were a member, that they had been enjoined by the courts, that their men had been arrested from time to time by rival claimants?

A. No, sir.

Q. You didn't hear anything of the kind?

A. No, sir.

Q. Did you hear any of them tell you that their financial assets had been interfered with by some of their rivals down there?

A. No, sir.

Q. You never heard that?

A. No, sir.

By MR. HAND:

Q. You said two years ago. You mean two years before what?

A. I meant two years after the repeal of the ordinance.

JOHN S. ELLIOTT, called for the plaintiff and sworn.

DIRECT-EXAMINATION.

By MR. HAND:

Q. Mr. Elliott, what is your present occupation and residence?

A. I am a civil engineer and reside in New York city.

Q. What position, if any, did you hold in connection with the Government of Porto Rico, in the year 1905?

A. I was until about the month of October, from February to October I was Commissioner of the Interior.

Q. Of Porto Rico?

A. Of Porto Rico.

Q. In 1905?

A. In 1905.

Q. Were you on the island of Porto Rico prior to February, 1905?

A. Yes; I was there July and the first of January, 1904, the last part of December, 1904.

Q. Do you recollect the negotiations just preceding the repeal of this ordinance and the circumstances surrounding the repeal of the franchise of the Vandegrift Construction Company?

A. I recollect the discussions between the time when I was installed as Commissioner of the Interior and the revocation, yes.

Q. Were you a member of the franchise committee?

A. I was a member of the franchise committee.

Q. Do you recollect just how long before the repeal of the ordinance, that is the passage by the Executive Council which I believe was on February 24th, how long you had been a member of the franchise committee?

A. I got down there I think on the 28th of January and was sworn in. I was there the whole month of February, so it was just a few weeks after I got there in 1905.

Q. Were you present at meetings of the franchise committee when persons claiming to represent the Porto Rico Railway, Light & Power Company appeared before the franchise committee and asked for further amendmetnts of the franchise?

JUDGE KELLY: That is objected to as immaterial, irrelevant and incompetent.

THE COURT: I will overrule the objection.

(Exception noted for the defendant.)

By MR. HAND:

Q. What is your answer?

A. I was.

Q. Can you recollect who appeared before the franchise committee?

A. Mr. Vandegrift appeared.

Q. Did Mr. Yeager appear?

A. I don't remember Mr. Yeager.

Q. Do you remember whether any of the firm of Rounds, Dillingham and Savage appeared?

MR. WARREN: Let him tell us who he does remember appeared.

By MR. HAND:

Q. Who else can you remember appeared?

A. My recollection was that Mr. Hunt was there.

Q. Do you know what firm he was member of?

A. He was a lawyer there at that time.

Q. Was he a member of the firm of Rounds, Dillingham and Savage?

A. I know Mr. Savage very well, I don't remember the actual name of the firm.

Q. I ask you with reference to the work done upon the railway between San Juan and the Playa of Ponce in connection with the franchise granted to the Vandegrift Construction Company. Will you tell us from your observation what work had been done prior to February 24, 1905, when the Executive Council passed the so-called repealing ordinance?

A. There was a mile or a little more than a mile of the grading practically completed from Rio Piedras going in the direction of Caguas. Then there was another stretch I think between and quarter and a half a mile that was partly completed.

Q. Did you have occasion to go over the ground between San Juan and Caguas frequently as commis-

sioner of the interior during the time in the month of February?

A. I went all over that ground looking for quarries at later times when I was commissioner and know that country well.

Q. What work besides this grading that you have spoken of had been completed between Caguas and San Juan?

A. I know of no other work.

Q. I ask you with reference to the work on the power dam at Comerio Falls prior to the time of the passage of this repealing ordinance February 24, 1905. Was the power dam built at Comerio Falls provided for by the ordinance?

A. No.

Q. I ask you with reference to the bridge going over the body of water flowing through the Boqueron into the harbor of San Juan. Whether the approaches and abutments of the bridge had been built prior to the repeal of the ordinance in February, 1905, or the passage of the repealing bill by the Executive Council in February, 1905?

A. I know of no abutments that were ever there.

Q. You have been over the ground?

A. I won't say that I was exactly over the stakes of the railway in that particular place.

Q. Were you where you could have seen the abutments if they were there?

A. I would have known it if they were there.

Q. Were you where you could see the ground over which the bridge would have to pass?

A. Yes, sir.

Q. And you saw no abutments?

A. I don't remember the abutments at all.

Q. What is the distance between San Juan and Caguas approximately?

A. About 20 odd miles I should say; 23 miles perhaps.

Q. At the time in February after you got there, the first of February, did you see any work being done along the line of that railway in connection with this franchise, any construction work?

A. During my incumbency do you mean?

Q. Yes, sir; after the first of February, did you see the work being done?

A. No, sir.

Q. I will ask you with reference to the water power at Comerio Falls. You testified you are a civil engineer?

A. Yes.

Q. Tell us what experience you have had in engineering work in tropics?

A. I lived some 12 years in the tropics as engineer on location and construction, and also have taken contracts down there.

Q. Did you examine the question of the water power at Comerio Falls?

A. Yes.

Q. Tell us some facts with regard to that?

MR. WARREN: We object to that.

THE COURT: What difference does it make?

MR. FEUILLE: For the purpose of showing the extent of the grant given to the Vandegrift Construction Company in its franchise.

THE COURT: I will sustain the objection.

(Court adjourned to 2 P. M.)

(Now 2 P. M. Court meets pursuant to adjournment.)

J. S. ELLIOTT, called for the plaintiff.

DIRECT EXAMINATION.

By MR. HAND:

Q. Mr. Elliott, I ask you whether up to the time of the forfeiting or the passing of the ordinance repealing the franchise originally granted to the Vandegrift Construction Company, there had been filed in the office of the commissioner of the interior plans for the roadbeds, tracks, side tracks, bridges and embankments and general construction of the railway?

JUDGE KELLY: We object to that as incompetent.

THE COURT: What is the purpose of it?

MR. HAND: Simply to show default on the part of the grantee.

THE COURT: How would it affect the case?

MR. HAND: It was one of the conditions of the bond that they should do certain work in accordance with the plans and specifications and do that work within one year. Now we propose to show they never presented plans and specifications, to show a default.

JUDGE KELLY: That is not the default declared upon in this case.

THE COURT: You don't propose this as a breach which you rely on, but in support of the breach on which you rely?

MR. HAND: Yes.

THE COURT: Very well, you may proceed on that.

(Exception noted for the defendant.)

MR. WARREN: We want our objection to also apply to the competency of the witness.

THE COURT: I will allow you to show that there were none on file and that none were filed while he was in the incumbency of the office.

THE WITNESS: Do you wish me to answer as to whether there was anything filed during my incumbency?

By MR. HAND:

Q. Whether you found anything filed when you came into the office and whether any plans and specifications were filed after you became commissioner of the interior?

A. Nothing was ever shown to me as being filed relating to plans and specifications before I got there, and I know that nothing was filed during my incumbency before the revocation.

Q. Did you look over the records in your office in connection with this franchise to find what had been done and what had not been done in connection with the repealing of this ordinance?

A. I had my assistants look it over.

Q. And report to you?

A. Yes, sir; as I remember.

Q. As the result of that what did you find in the office? What had been done, what had been filed?

MR. WARREN: We object to that as incompetent.

THE COURT: I don't think that that would be competent.

CROSS-EXAMINATION.

By MR. WARREN:

Q. Tell me so I may be sure the date of your incumbency of the department office as commissioner of the interior?

A. I was sworn in about the first day of February. I doubt if it was two days later or two days before.

Q. About the first of February, 1905?

A. Yes.

Q. At the commissioner's office?

A. Yes, sir.

Q. You had a commissioner's office?

A. Yes.

Q. And records and things?

A. Yes.

Q. Dockets and all that sort of thing?

A. Yes, sir.

Q. And you took possession of the office in that situation?

A. Yes, sir.

Q. Who preceded you as commissioner of the interior?

A. There was no one in charge when I got down there except an assistant commissioner. My predecessor was a man of the same name, Mr. Elliott.

Q. Another man than yourself?

A. An entirely different man.

Q. Is there a book there that you found that had to do with all matters of the commissioner's office that he had charge of?

A. There was various papers filed away relating to the various things.

Q. I didn't ask you that, I asked you if there was a book, a sort of a docket or register book. Was there a book in the commissioner's office when you reached there that covered all the various papers and everything filed there?

A. There is an index.

Q. There was such a book?

A. Yes, sir.

Q. And it is there yet so far as you know?

A. I presume so.

Q. How long did you serve as commissioner?

A. Eight months.

Q. Then you left the island?

A. I resigned and left the island.

Q. You were there then from February first until the late fall of that same year?

A. Yes, sir; some time in October.

Q. After what is called here a revocation of the ordinance, and I suppose you understand that means the revocation of the original ordinance giving a grant or franchise to the Vandegrift Construction Company and thereafter to the Porto Rico Railway Company. I suppose you understand that is the ordinance you speak of?

A. Yes, sir.

Q. After that the records of your office disclose the granting of the franchise to another concern, do they not?

A. I don't remember that.

Q. Don't you remember that somebody else took this falls water power, of which you spoke this morning and completed it and are using it to-day?

A. That was long after my time.

Q. That was not until after you left the island?

A. No, sir.

Q. How long was that done when you left the island?

A. When I left the island nothing had been done with the water fall at all, except perhaps a survey in connection with it.

Q. You knew at that time, did you not, of these falls?

A. Yes; very well.

Q. Had you investigated them to determine the question of their power?

A. Yes; that is, I had gone over the various reports which were made.

Q. What I mean is—I understood you to qualify this morning as an engineer of experience in the tropics—in connection with the development of the water power?

A. Yes.

Q. Therefore I assume you could tell us the value per horse power of the water power of this Comerio water falls?

A. I could not tell you the value per horse power, I could give you some kind of an idea of how much various reports showed was there as a minimum.

Q. Those are not investigations you made?

A. No, sir.

Q. All you could tell us is that you examined certain reports of other civil engineers?

A. Yes, sir.

Q. You could tell us what those reports were?

A. Yes, sir.

Q. Do you know who those engineers were?

A. I forget now who made the reports.

Q. Had you ever visited the falls?

A. Yes; three times.

Q. You knew then that their development into a commercial proposition, and by that I mean by the construction of different machinery and appliances a plant necessary to convert the water fall into a commercial proposition as a horse power product would require time?

A. Of course it would require time.

Q. And you would have to have the land on each side of the flowing river in order to locate your plant?

A. You would have to have certain rights, of course.

Q. Tell me was this fall in the stream?

A. Yes.

Q. It was a water fall in a running stream?

A. Running stream.

Q. About what was the width of the stream?

A. It averaged, because in places it was most rapid, a succession of cataracts, it might be 50 feet across in places.

Q. And the power plant would be located somewhere to avail the builders of it in this cataract or running water down to where the plant would be? Isn't that right?

A. How is that?

Q. The plant would have to be located on one side or the other of this stream and then arrangements would have to be made to get that water into turbine wheels or different mechanical devices to be used to convert it into electric power?

A. Yes, sir.

Q. And the machinery equipment for such a proposition is one that is not only expensive in cost, but it is a slow proposition to develop it into an actual going concern, anything like the maximum of its ultimate power, is it not?

MR. HAND: We object to this as not cross-examination.

THE COURT: I will sustain the objection.

By MR. WARREN:

Q. I assume, you having stated you left the island in the late fall of that year, that you haven't returned to the island?

A. Yes, I have.

Q. Having returned to the island and finding that another concern or corporation has built the road that it was contemplated was to be built by the Vandegrift Construction Company or its assignee and has also developed the water power, have you not?

MR. HAND: I object to that as not cross-examination.

THE COURT: The objection is sustained.

By MR. WARREN:

Q. Are you an official of the government of Porto Rico now?

A. No, sir.

Q. Then your visit there was simply a personal visit?

A. On business, yes, sir.

Q. Your own private business?

A. Yes, sir.

Q. Tell me the name of the Mr. Elliott who was your predecessor?

A. He is known as General Elliott, William H. Elliott.

By MR. HAND:

Q. About how many men are there on the insular police force of Porto Rico?

MR. WARREN: We object to the question as incompetent.

THE COURT: What is the purpose of the question?

MR. HAND: The purpose of the question, to be followed by other questions of a similar nature with reference to the rights to be granted in this ordinance by the Vandegrift Construction Company, its successors and assigns to the People of Porto Rico in connection with the railway, is to show that the subject matter of the grant was a matter of contract under the proprietary rights of the people of Porto Rico and that the people of Porto Rico were interested in their proprietary and private capacity in the building of this road by the grantee.

THE COURT: What has that got to do with this lawsuit?

MR. HAND: Simply to negative, in the first place, any possible contention that the penalty named in the bond is a mere statutory penalty imposed by legislative authority without any regard to any possible damage that might accrue to the people of Porto Rico; and to show that this is in effect a suit of a civil nature, and not for a mere statutory penalty.

THE COURT: I don't think that any advice that we can get out of the facts you propose to prove would establish anything else than that this was a civil suit. You are suing for damages; you claim \$100,000 on the bond, that being the sum named in the bond. I don't see how the question you have now asked Mr. Elliott has any bearing upon that unless it be that you propose to show some elements of damage to get into the question of elements of damage to make out something within the \$100,000.

MR. HAND: That is not the purpose. It is simply to show that this is not a mere grant of a franchise without any valuable rights and concessions being reciprocally granted to the people of Porto Rico.

THE COURT: I will sustain the objection.

By MR. HAND:

Q. Will you tell us where the prisons were located in Porto Rico with reference to the line of this proposed railway and where the courts were held?

MR. WARREN: I ask for an offer.

THE COURT: You ask this question in view of the provision of the ordinance that this railroad was to transport the prisoners free? Is that it?

MR. HAND: Yes.

THE COURT: What is the purpose?

MR. HAND: Simply to show that there were valuable reciprocal grants provided to be made in the ordinance by the grantee and which were made in pursuance of the acceptance of the terms and conditions of ordinance to the people of Porto Rico, for the purpose of showing that this is a suit of a civil nature and not merely a suit for the enforcement of any penal law.

MR. WARREN: We don't interpose any objection to the government of Porto Rico through their counsel here showing any actual damages they sustained by reason of the failure on the part of the Vandegrift Con-

struction Company or its assignee, as the paper of assignment says, within the time that they were permitted to try to carry out the grant.

THE COURT: Either in this respect or in any other found in the contract?

MR. WARREN: As to anything. We don't say they ought to be precluded, and we don't oppose their proof of actual loss they sustained.

THE COURT: Does the plaintiff wish to introduce the testimony for this purpose?

MR. HAND: No; we do not. The offer is for the purpose of showing that there were by this ordinance valuable rights and concessions reciprocally granted by the grantee to the People of Porto Rico and that, therefore, they had a proprietary interest in the subject of the grant.

THE COURT: Is that objected to?

MR. WARREN: We object to it as immaterial.

THE COURT: I will sustain the objection.

(Exception noted for the plaintiff at whose request a bill is sealed.)

Plaintiff rests.

JUDGE KELLY: We move for a compulsory nonsuit on the ground:

First.—That the plaintiff has failed to prove the material allegations set out in the declaration.

Second.—That the plaintiff has failed to prove that any of the conditions of the bond sued upon were not complied with.

Third.—The plaintiff has failed to prove that the Vandegrift Construction Company did not within three years from the date of the acceptance by it of said ordinance fully complete the work therein authorized in accordance with the conditions therein contained and

in accordance with the plans and specifications therefor approved as therein provided; and within the said period of three years from the date of the acceptance by it of said ordinance build, complete and have in operation the entire line of railway authorized therein for such terminal in the municipality of San Juan as may be determined by the said Executive Council to its terminal in Playa on the Ponce on a route from Ponce to be determined by said Executive Council, in accordance with the conditions in said ordinance contained, and within the said period of three years from the date of the acceptance by it of the said ordinance did not also complete and have in operation the entire power plant and transmission lines necessary for operating the said entire line of railway, in accordance with the conditions therein approved and therein provided; and did not perform within the said period of three years all other terms and conditions in said ordinance required to be performed by the principal, the the Vandegrift Construction Company, within the said period, and did not pay to the obligee any loss or damage accruing against the said obligee by reason of the construction of the work in said ordinance authorized at any time during the period of construction therein limited and before the said work had been certified by the Commissioner of the Interior as in section 35 of said ordinance provided.

Fourth.—The amount stated in the bond constitutes a penalty and not liquidated damages, and the plaintiff has offered no evidence which would enable the jury to assess the damages suffered by the plaintiff on account of the alleged breach of the conditions of the bond.

Fifth.—The plaintiff has failed to produce any evidence which would warrant the jury in finding that the Vandegrift Construction Company ever accepted the terms and provisions of the ordinance passed July 7, 1904, amending the terms of the original ordinance as

required by its provisions in order to make it effective.

Sixth.—The plaintiff has failed to produce any evidence which would warrant the jury in finding that the Porto Rico Railway, Light & Power Company ever accepted the terms and provisions of the ordinance passed July 7, 1904, amending the terms of the original ordinance as required by its provisions in order to make it effective.

Seventh.—The passage of the amended ordinance of July 7, 1904, without the knowledge or consent of the defendant had the effect of releasing the defendant from the obligation of the bond.

Eighth.—The passage of the ordinance of February 24, 1905, revoking the original ordinance had the effect of releasing the defendant from the obligations of the bond.

Ninth.—This case is to be governed by the laws of the United States, and under these laws the action of the executive council of Porto Rico, which the plaintiff has established herein evidence, released the surety, this defendant, upon the bond in question in this suit.

Tenth.—Even if the law of Porto Rico governs this case, the action of the executive council of the government of Porto Rico, which the plaintiff has offered in evidence in this case, released this defendant from any liability as surety upon the bond in question in this suit.

Eleventh.—The evidence produced by the plaintiff shows that within the time stipulated in the bond for the performance of the obligation of the bond the plaintiff rescinded the ordinance which constituted the contract between the plaintiff and the principal in the bond without any notice to the defendant company, the surety, thus rendering it impossible for either the principal or the surety to have complied with the conditions of the bond.

Twelfth.—The plaintiff having rescinded the con-

tract between it and the principal in the bond by rescinding and repealing the original ordinance, rendered it of no force and effect the same as though it had never been passed, the effect of which was to release the surety from its obligation the same as if the bond had never been entered into.

(Court adjourned to 9.30 A. M. Nov. 6, 1909.)

(Now 9.30 A. M. November 6, 1909, court meets pursuant to adjournment.)

THE COURT: The disposition of this motion of course depends in the first instance upon the question whether the case is to be governed here by the law of Porto Rico or by that which is familiar to us here in the United States, according to the common law of England. There can be no question that the place where the contract is to be performed is the governing thing in determining the law with regard to it. And that of course depends in its turn upon the character of the contract, and where the contract is to do a certain thing the place where that is to be done is the place that we look to for the law governing it. For instance there can be no doubt here that the contract with the Vandegrift Construction Company, in accordance with which this bond was exacted and furnished, was to be performed in Porto Rico. But that is one thing and the bond is another. The bond is an obligation to pay money. It is not an obligation to do a thing. It is conditioned upon a certain thing being done, but that also is exterior to the bond. We look to the contract, which this bond as it were guaranteed, to see the nature of things that were required of the principal in the bond. But the suerty had nothing to do with that. This was not a guaranty that the work should be carried out; it wasn't an un-

dertaking by the defendant company here to do anything of that kind. It had no opportunity to see that that contract was carried out. It had to rely entirely for that upon the party for whom it became surety. Pure and simple the contract here is a contract to pay money. \$100,000 is the obligation of the defendant company according to the terms of the bond conditioned upon certain things. When those conditions are broken liability attaches. That has got to be kept constantly in mind. Ordinarily where a person gives a money obligation it is to be paid where he is, where his domicile is or his place of business. If it were a note, not being made payable at bank or a specific place, demand upon him would be made at his business place, or his residence, if he had no business place. He would be sought out personally. There he would be required to pay, and if he didn't pay his note would be dishonored.

I can see no difference from that with regard to a bond or other money obligation, and a policy of insurance is somewhat similar. And so here we have, and we must keep that constantly in mind, an obligation to pay money.

The cases that have been cited and relied upon to show that the obligation of a surety may be determined by the place where the contract is to be performed, those cases also being cases as you might say to a certain extent of a money contract, have this distinction: Take the cases where there is a bond for the accounting for moneys to the government, there unquestionably it is at the seat of the government that the money is to be accounted for. Therefore the surety in undertaking to make good what the principal was to do binds himself to account there, or to pay if the accounting is not properly done. The government is not called upon to seek him out where he is. It seems to me that in those decisions it is recognized not only that that principle pre-

vails, but that to a certain extent the cases form an exception, or at least they exemplify the rule and do not depart from it. So with regard to the undertaking by a surety to indemnify a person who had gone on to a bond on appeal, the appeal being taken in the courts of Louisiana and the bond to indemnify being executed in New York. There the solution of that undertaking to make good or indemnify or save harmless the surety in the appeal bond was necessary to be performed where the damage to the surety accrued, which was in Louisiana, and that also is to be written into that case and is a distinguishing feature of it.

So a guaranty like a letter of credit which is given to a person who goes abroad, the obligation or the liability accrues to the extent that the letter of credit is used abroad, and it grows out of the very circumstance that the party to whom it is given draws upon it in that way and obtains credit and money, and necessarily the guaranty is to be there met and performed. z

Now in this case, as I have already said, the defendant company didn't undertake to carry out the contract in Porto Rico, the construction contract under the franchise that was given to the Vandegrift Construction Company in case the Vandegrift Construction Company did not. Neither did it undertake to indemnify or save harmless the people of Porto Rico for the failure of that company to so comply. It simply agreed to pay a definite, specific sum of money, which is now demanded of it, in case the conditions were not complied with, in case the company failed to perform that agreement. We can illustrate the difficulty that would accrue if we would say that an obligation of this character is to be governed by the place of performance of the contract which it assured or became surety for. Suppose the construction company, the principal in the bond, was to build a railroad in the Sahara desert, an example

which I suggested to counsel, what would be the law that would govern then? Are we to seek out and find the law that prevails there where possibly there is no law? Or other illustrations, some places like places on the African continent: Suppose it was to build a pipe line in the Madagascar oil fields, is the law of Madagascar, whatever it may be, if there is any, to be the contract? It is true we have possibly a little different situation here, and that these are extreme cases, but at the same time we have got to square ourselves and see where we are before we lay down a principle which must be of general observation.

Looking to the character of this which, as I repeatedly have said, is simply an undertaking to pay money its solution is here demanded, is to be made here. It is not called upon to go with the money to the Island of Porto Rico and there tender any solution of its bond. If it was a note the dishonor of it would occur here. The party who held the note would come and demand payment here. Payment is now being demanded here.

It is peculiarly true also, as I might say, although possibly I am insisting too much upon this, but it comes to me that the defendant here is a corporation, not an individual. I don't know on principle that that makes any difference except simply to emphasize the circumstance. A corporation is domiciled where it has its corporate existence, and the defendant company is a corporation and citizen of the State of Pennsylvania. It does business here. It sends out its agents elsewhere and it must become responsible, of course, according to what its agents do in different parts of the world, but at the same time when it gives an obligation, a bond, agrees to pay a certain amount of money, the presumption is, without something else governs it, that it is to pay here; that its liability thereon is to be according to the law by which it is governed here, not abroad, unless

there is something that should control it. It is true in this case that the undertaking here was with the People of Porto Rico, a municipality on a distant island, and also that there was to be an approval of this bond there. That is a circumstance that is not to be lost sight of, but it seems to me that it is not controlling. The approval of the bond was merely a signification by the proper officers that the bond was acceptable to them in form and substance, the sureties were accepted. But that didn't alter the circumstance that the surety had already become obligated. The surety could not withdraw from that once having signed and sealed it and parted with it. It wasn't as though this surety company was making a commercial proposition, as we might say, by letter or in any other form, that was only to become binding upon it in case it received the acceptance and approval of the party to whom it was addressed. This was a perfect obligation when it left the hands of the corporation, and the action of the officials in Porto Rico was merely an indication, a formal indication called for by the franchise ordinance, that they were satisfied with the responsibility of the surety and with the character of the bond as it read, that it complied sufficiently with the ordinance to warrant their approval. All these things, and possibly others that might be suggested, it seems to me are controlling in this case, and determine that the place of solution of this bond, of this contract, is here, the payment to be made here, and that, therefore, the law here is the law which in entering into the bond it must be assumed that both parties understood was to govern the People of Porto Rico as well as the people, the sureties here. In going abroad, if you please, to get security for this work, or putting it a little more favorably to the plaintiff, the People of Porto Rico in accepting as a surety on the bond of the Vandegrift Construction Company, a cor-

poration of another country, the People of Porto Rico must be assumed to have been satisfied to accept liability upon that bond in accordance with the ordinary rule which is to prevail that the place of solution, the place of performance by that particular obligation was to be the guiding law in determining the responsibility. If I am correct in this view and that the law of this country rather than the law of Porto Rico governs the liability upon this bond, then it follows naturally that the plaintiff has made out no case.

I do not rest this upon the circumstance that no actual damage has been shown. If that were all, there would be this to be said, that, in the first place, the plaintiff would be entitled to recover nominal damages which would save a non-suit possibly, and, on the other hand, I would certainly open the case and give the plaintiff an opportunity to prove substantial damages if it was in a position to do so. But when we come to determine the responsibility of the defendant on this bond by the law which prevails here it seems to me that there can be no doubt in the mind of counsel as to what the result must be. The contention has been to escape from that as to which I think there is no escape. Under our law an agreement between the principal and the party to whom the obligation of suretyship is given cannot be materially modified without releasing the surety. That is to say, the surety undertakes to become responsible upon a certain contract or in accordance with the terms of that contract; that is the full extent of its undertaking. It does not undertake to become responsible for another contract which may be made between the parties, and that virtually is the case when there is a material modification in the existing contract at the time the obligation of suretyship was entered into.

In this case by the two ordinances which were subsequently passed there were very material changes

made in the existing contract between the People of Porto Rico and the Vandegrift Construction Company. That it seems to me is as clear as need be. The amending ordinance of the 7th of July introduced new and different provisions. Perhaps the most serious one of which was that upon the failure to comply with the particular terms and conditions introduced by the amendment of the fifteenth section of the original ordinance there would be a right of forfeiture which did not exist under the original contract. Further than that, we have the subsequent ordinance by which all rights under this were wiped out. I do not doubt that there are some cases where, notwithstanding what may be called the abrogation of an agreement, there may be some responsibility still remaining against the surety upon it, but I do not need to go into that at length because if there are any such cases I don't see that the one we have here comes within any such exception. Here, while the general term under which the parties possibly had a chance to make good was still running, the whole thing was wiped out. They had no chance or possibility after that to do anything. It may be that the delays which had been encountered deserved action on the part of the People of Porto Rico, but that doesn't enter into the case. When we come to consider the obligation of the surety, all rights and franchises and privileges under the original ordinance were gone. The People of Porto Rico evidently desired, as they subsequently did, to look to somebody else and get rid of those with whom they had entered into an arrangement by the original ordinance. They reserved that right in the provision of the thirtieth section to annul and abrogate the rights, privileges and concessions granted, to amend and alter them.

It has been contended that that justified what was done under the two ordinances to which I have referred.

It doesn't seem to me that that is a proper construction of that privilege. It reserved the right to recall, as was eventually done to cancel the concessions which had been given, but in doing that they couldn't take back and at the same time hold the parties to the performance. They might do one or the other. They might even get new parties to take up the burden that they compelled the other party to lay down, but they couldn't absolutely wipe out the relations between themselves and the principal in the bond and then hold the surety because the principal had not performed.

These considerations seem to me to result in simply one thing, and that is that the plaintiff here has no case under the facts which have been proven, and that, therefore, it becomes my duty which I cannot avoid, to so declare and to enter the compulsory non-suit which is asked for.

MR. HAND: We now make a motion for a rule to show cause why the non-suit should not be taken off.

THE COURT: Let a rule be entered to show cause why the non-suit should not be taken off returnable *sec. reg.*

The foregoing constitutes all the evidence produced at the trial of the cause, together with the motion and reasons for compulsory non-suit made by defendant's counsel, the ruling of the Court thereon, the motion of the plaintiff's counsel for a rule to show cause why the non-suit should not be taken off, and the order of the Court directing said rule to be entered; and the counsel for plaintiff did then and there at the trial except to the rulings of the Court as indicated in the foregoing notes of evidence.

And thereafter, to-wit, on December 29th, 1909, the rule to show cause why the compulsory non-suit entered at the trial should not be taken off, and a new trial awarded, came on to be heard, and was argued before the said Court by counsel for the respective parties, and

thereupon the said Court discharged the said rule, and refused to take off the compulsory non-suit, and directed judgment to be entered in favor of the defendant with costs, to all of which plaintiff's counsel thereupon excepted, the order of said Court being as follows, to-wit:

"Now, December 29, 1909, this cause coming on to be heard on rule to show cause why the compulsory non-suit entered at the trial should not be taken off, and a new trial awarded, and having been argued by counsel for the respective parties, upon due consideration thereof it is thereupon

ORDERED AND ADJUDGED that the rule to show cause be and the same is hereby discharged, and judgment is directed to be entered in favor of the defendant for costs, to which refusal to take off said non-suit and the direction of judgment in favor of the defendadnt the plaintiff excepts.

(Signed) R. W. ARCHBALD,
District Judge."

And, thereafter, to-wit, on December 30th, 1909, in pursuance of stipulations signed by counsel for the respective parties, it was ordered by the Court, that the time for filing the bill of exceptions be extended to January 15th, 1910.

And now, in furtherance of justice and that right may be done, the plaintiff, the People of Porto Rico, tenders and presents the foregoing as its bill of exceptions in this case to the rulings and action of the Court in the various particulars therein set out, and prays that the same may be settled and allowed and signed and sealed by the Court and made a part of the record, and the same is accordingly done, (the defendant having waived submission of a copy hereof of five days before presentation for allowance), this 8th day of January, A. D. 1910.

(Signed) R. W. ARCHBALD, (Seal)
Trial Judge.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA.

AT LAW.

October Term, 1906. No. 66.

The People of Porto Rico

v.

The Title Guaranty & Surety Company.

ASSIGNMENTS OF ERROR.

The plaintiff in this action, the People of Porto Rico, in connection with its petition for a writ of error, makes the following assignment of errors, which it avers occurred upon the trial of the cause and in the decision of said Court, to wit:

First.—The United States Circuit Court in and for the Middle District of Pennsylvania, erred in refusing to take off the compulsory non-suit entered by the Court, the order of the Court being as follows:

“Now, December 29, 1909, this cause coming on to be heard on rule to show cause why the compulsory non-suit entered at the trial should not be taken off, and a new trial awarded, and having been argued by counsel for the respective parties, upon due consideration thereof it is thereupon

ORDERED AND ADJUDGED that the rule to show cause be and the same is hereby discharged and judgment is directed to be entered in favor of the defendant for costs, to which refusal to take off said non-suit and the direction of judgment in favor of the defendant the plaintiff excepts.

(Signed) R. W. ARCHBALD,
District Judge.”

Second.—The said Court erred in directing judgment to be entered in favor of the defendant for costs, as per the order recited in the preceding assignment.

Third.—The said Court erred in refusing to permit the counsel for plaintiff in error to introduce in evidence the following document offered by the plaintiff, to wit, the assignment dated October 8, 1904, from The Vandegrift Construction Company to the Porto Rico Railway, Light & Power Company, marked and identified as "Plaintiff's Exhibit L," which offer and the ruling of the Court thereon was as follows, to wit:

MR. HAND: We offer to prove the execution of an assignment by the Vandegrift Construction Company, dated October 8, 1904, assigning to the Porto Rico Railway, Light & Power Company the privileges, franchises, rights, grants and concessions given and granted to the Vandegrift Construction Company by the Executive Council of Porto Rico, by an ordinance adopted by the Executive Council on the 7th day of July, 1904, amending the original grant or franchise to the Vandegrift Construction Company, adopted by the Executive Council March 2, 1903.

JUDGE KELLY: We object to the proof of the execution of this paper because it is immaterial and irrelevant and incompetent to prove or tending to prove any fact material to the issue now before the Court.

THE COURT: The objection is overruled.

(Exception noted for defendant, at whose request a bill is sealed.)

By MR. HAND:

Q. I show you paper marked "Plaintiff's Exhibit L;" is that your signature as president of the Vandegrift Construction Company?

A. Yes, sir.

Q. You were the president of the Vandegrift Construction Company, were you, at that time?

A. Yes, sir.

Q. To whom was this paper delivered?

JUDGE KELLY: We object to that as immaterial.

A. I don't remember to whom it was delivered.

MR. HAND: You remember that it was delivered to the Porto Rico Railway, Light and Power Company?

JUDGE KELLY: I object to that as immaterial and irrelevant.

THE COURT: Prove this paper first before you deliver it.

JUDGE KELLY: Q. Your company had a seal?

A. Yes, sir.

Q. A regular seal with an impression?

A. Yes, sir.

Q. In other words, the impression on the paper last shown to you showed the seal of your company.

A. That is the seal of our company.

By MR. HAND:

Q. Did you acknowledge this instrument as president of the Vandegrift Construction Company?

A. I don't remember now whether I acknowledged it or not.

Q. There is a signature; who is that?

A. Ralph Rounds.

Q. Did you go before Ralph Rounds and acknowledge that paper?

A. I couldn't say that either.

Q. Who was Ralph Rounds?

A. He was an attorney and commissioner for Porto Rico; he is, I suppose; he is an attorney in New York.

Q. Was he an attorney for the Porto Rico Light and Power Company and for the Vandegrift Construction Company?

JUDGE KELLY: We object to that as immaterial?

By MR. HAND:

Q. Isn't it a fact he acted as attorney for both companies?

A. His firm acted as attorney for both companies; yes, sir.

Q. Where was this acknowledgment taken?

JUDGE KELLY: The gentleman has said he don't remember.

By MR. HAND:

Q. Where were you when you signed that paper, October 8, 1904?

A. I don't know whether I was in New York or Philadelphia, or where I was; it purports to have been taken in New York.

Q. Will you swear you didn't appear before Mr. Rounds and acknowledge that paper in New York on the 8th of October?

A. No, I will not swear I did or did not.

Q. Have you any way of refreshing your recollections as to where you were on the 8th of October, 1904?

A. Not here I have not; no, sir.

(The counsel for the plaintiff offer the paper in evidence.)

JUDGE KELLY: We object to the offer as incompetent, irrelevant and immaterial. There is no authority shown in the president of the company to execute the paper; and there is no offer to show any authority from the company to the president to execute the paper. There is no seal of the company attached to this paper, which might be argued to give it *prima facie* authenticity. There is no certificate of the seal of the commissioner for Porto Rico upon or attached to the purporting acknowledgment of the paper; no certificate of the fact that Ralph S. Rounds was a commissioner for Porto Rico at the time. The paper is therefore incompetent and of no force and effect to the prejudice of this defendant in this issue.

THE COURT: I sustain the objection. That is to

say, to this extent: I think that you have got to prove the authority to execute.

MR. HAND: By what authority did you execute this paper?

JUDGE KELLY: We object to that as not competent; the only authority that could be given to this man as president of the company to execute the paper would necessarily be of some sort of corporate action or by by-laws, perhaps. It is therefore incompetent for them to show authority in this way.

MR. HAND: The evidence of the witness will show to what extent he had authority.

THE COURT: You are supposed to know before you ask the question.

MR. HAND: We offer to show by the witness that he had authority from the board of directors of the corporation to execute this paper.

JUDGE KELLY: We ask the gentleman to incorporate in his offer how he proposes to show that, whether by minutes of the board of directors or the mere say so of the witness.

MR. HAND: By showing the witness' authority as president of the company and his other acts as president ratified by the board, and that he was authorized as president of the company to make this assignment, inasmuch as the company had already executed the assignment of the original franchise to the Porto Rico Railway, Light & Power Company, and that this was in furtherance of that assignment which has already been offered and received in evidence.

JUDGE KELLY: I renew the objection to the offer.

THE COURT: I sustain the objection.

(Exception noted for plaintiff, at whose request a bill is sealed.)

The paper offered in evidence was in words and figures as follows, to wit:

"Plaintiff's Exhibit L," offered and rejected by the Court, is as follows:

"Know all men by these presents, that Vandegrift Construction Company, a New Jersey corporation, in consideration of one dollar to it in hand paid by Porto Rico Railway, Light & Power Company, a New Jersey corporation, and other valuable considerations, has bargained, sold, assigned, transferred, conveyed and set over, and does hereby bargain, sell, assign, transfer, convey and set over, unto the said Porto Rico Railway, Light & Power Company, its successors and assigns, all the privileges, franchises, rights, grants and concessions given and granted to the said Vandegrift Construction Company by the Executive Council of Porto Rico, by an ordinance adopted by the Executive Council at a meeting thereof held on the 7th day of July, A. D. 1904, amending a certain other ordinance adopted by the said Executive Council at a meeting thereof held on the 2nd day of March, A. D. 1903, and entitled 'An ordinance granting to the Vandegrift Construction Company the right to build and operate a line of railway between the Municipality of San Juan and the Playa of Ponce in the Island of Porto Rico and to develop electric energy by water or other power for distribution and sale for railway, lighting and industrial purposes,' and also all privileges, franchises, rights, grants and concessions given and granted to the said Vandegrift Construction Company by any other extensions or amendments of the said franchise of March 2, 1903, and also all such privileges, franchises, rights, grants and concessions given and granted to the said company by the said Executive Council by the said ordinance of March 2, 1903, as extended and modified by said ordinance of July, 1904, and all rights and privileges under said ordinance as extended and amended, and all property, interests and rights thereby granted

or conveyed; and said Vandegrift Construction Company hereby confirms, releases and grants to the said Porto Rico Railway, Light & Power Company full right and title in and to the said ordinance of March 2, 1903, and all rights, privileges and property granted thereby.

"To have and to hold all the said privileges, franchises, rights, grants, concessions and property unto the said Porto Rico Railway, Light & Power Company, its successors and assigns forever; subject, however, to the terms, conditions, agreements, stipulations and royalties in the said ordinances or any of them contained, to the observance and performance of all of which the said Porto Rico Railway, Light & Power Company is hereby obligated and bound.

"In witness whereof, the said Vandegrift Construction Company has caused its corporate seal to be hereunto affixed and these presents to be signed by its president this 8th day of October, 1904.

"VANDEGRIFT CONSTRUCTION
COMPANY,

"By J. A. VANDEGRIFT,
"President.

"STATE OF NEW YORK, } ss.
COUNTY OF NEW YORK, }

"On the 8th day of October, 1904, before me personally came Joseph A. Vandegrift, to me known, who being by me duly sworn, did depose and say that he resided in Philadelphia, Pennsylvania; that he is the president of the Vandegrift Construction Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board

of Directors of said corporation, and that he signed his name thereto by like order.

"RALPH S. ROUNDS,
(Seal) "*Commissioner of Porto Rico.*"

Fourth.—The said Court erred in refusing to permit counsel for plaintiff in error to show by W. F. Willoughby, a witness called on behalf of plaintiff, certain facts tending to show an implied acceptance on the part of the Porto Rico Railway, Light & Power Company, assignee of the Vandegrift Construction Company, of the terms of the so-called amending ordinance. The offer and ruling of the Court being as follows:

MR. HAND: We propose to show by the witness on the stand that the amending ordinance was enacted in pursuance of a petition from the Porto Rico Railway, Light & Power Company requesting an extension of time within which to do the work provided to be done within one year from the date of the acceptance of the original ordinance; that subsequent to the enactment of the amending ordinance the assignee of the original grantee, to wit, the Porto Rico Railway, Light & Power Company, went on and exercised the rights granted by the ordinance as amended, to wit, in relation to the construction of the railroad provided thereby, and that subsequently, to wit, about the month of December, 1904, they presented to the Executive Council of Porto Rico a petition asking for other amendments to the ordinance. This for the purpose of showing an implied acceptance on the part of the Porto Rico Railway, Light & Power Company, the assignee of the original grantee, of the terms of the so-called amending ordinance.

MR. WARREN: We object to the offer and ask the counsel for plaintiff to let us see the petition which they propose to show by the witness. The offer is objected to as incompetent. We also object to this offer as incompetent and immaterial, generally and specifi-

cally, because there was no right in the original ordinance, so-called, to permit of any amendment or alteration of its terms; that the statement in one of the sections thereof, giving to the legislative council the alleged right, was in violation of the laws of Porto Rico governing such council, and the effort to change the contract between the Vandegrift Construction Company and the Government of Porto Rico in such a way was illegal. We further object because this is an effort to show, so far as we can grasp it, that the Porto Rico Railway, Light & Power Company undertook to get a change in the contract it assumed as the assignee of the Vandegrift Construction Company, and any of its acts in connection therewith materially altering the contract that had been made with the Vandegrift Construction Company without this defendant's knowledge and consent cannot bind it, particularly in the absence of the knowledge or consent of the Vandegrift Construction Company, and as it has to do with matters which the legislative body could not do in any way which it is pretended they did by the paper offered in evidence here. Further, that the facts offered to be proven for the purpose of showing an acceptance do not and would not show an acceptance.

THE COURT: I will sustain the objection.

(Exception noted for plaintiff, at whose request a bill is sealed.)

Fifth.—The Court erred in refusing to permit the counsel for the plaintiff in error to show by the witness, John S. Elliott, that there were, by the so-called original ordinance, valuable rights and concessions reciprocally granted by the grantee to the People of Porto Rico; and that, therefore, the People of Porto Rico had a proprietary interest in the subject of the grant and in the building of the road by the grantee. The offer and ruling of the Court thereon being as follows:

MR. HAND: About how many men are there on the insular police force of Porto Rico?

MR. WARREN: We object to the question as incompetent.

THE COURT: What is the purpose of the question?

MR. HAND: The purpose of the question, to be followed by other questions of a similar nature with reference to the rights to be granted in this ordinance by the Vandegrift Construction Company, its successors and assigns to the People of Porto Rico in connection with the railway, is to show that the subject matter of the grant was a matter of contract under the proprietary rights of the People of Porto Rico, and that the People of Porto Rico were interested in their proprietary and private capacity in the building of this road by the grantee.

THE COURT: What has that got to do with this lawsuit?

MR. HAND: Simply to negative, in the first place, any possible contention that the penalty named in the bond is a mere statutory penalty imposed by legislative authority without any regard to the possible damage that might accrue to the People of Porto Rico; and to show that this is in effect a suit of a civil nature, and not for a mere statutory penalty.

THE COURT: I don't think that any advice that we can get out of the facts you propose to prove would establish anything else than that this was a civil suit. You are suing for damages; you claim \$100,000 on the bond, that being the sum named in the bond. I don't see how the question you have now asked Mr. Elliott has any bearing upon that unless it be that you propose to show some elements of damage to get into the question of elements of damage to make out something within the \$100,000.

MR. HAND: That is not the purpose. It is simply to show that this is not a mere grant of a franchise

without any valuable rights and concessions being reciprocally granted to the People of Porto Rico.

THE COURT: I will sustain the objection.

MR. HAND: Will you tell us where the prisons are located in Porto Rico with reference to the line of this proposed railway and where the courts were held?

MR. WARREN: I ask for an offer.

THE COURT: You ask this question in view of the provision of the ordinance that this railroad was to transport the prisoners free. Is that it?

MR. HAND: Yes:

THE COURT: What is the purpose?

MR. HAND: Simply to show that there were valuable reciprocal grants provided to be made in the ordinance by the grantee and which were made in pursuance of the acceptance of the terms and conditions of the ordinance to the People of Porto Rico, for the purpose of showing that this is a suit of a civil nature and not merely a suit for the enforcement of any penal law.

MR. WARREN: We don't interpose any objection to the government of Porto Rico through their counsel here showing any actual damages they sustained by reason of the failure on the part of the Vandegrift Construction Company or its assignee, as the paper of assignment says, within the time that they were permitted to try to carry out the grant.

THE COURT: Either in this respect or in any other found in the contract?

MR. WARREN: As to anything. We don't say they ought to be precluded, and we don't oppose their proof of actual loss they sustained.

THE COURT: Does the plaintiff wish to introduce the testimony for this purpose?

MR. HAND: No; we do not. The offer is for the

purpose of showing that there were by this ordinance valuable rights and concessions reciprocally granted by the grantee to the People of Porto Rico, and that, therefore, they had a proprietary interest in the subject of the grant.

THE COURT: Is that objected to?

MR. WARREN: We object to it as immaterial.

THE COURT: I will sustain the objection.

(Exception noted for the plaintiff, at whose request a bill is sealed.)

Sixth.—The Court erred in refusing to permit the counsel for the plaintiff in error to show by the witness, W. F. Willoughby, that the \$100,000 deposited with the plaintiff by the Vandegrift Construction Company was returned to the latter after the passage of the original ordinance, and the filing of the acceptance and bond by said Vandegrift Construction Company, as provided by the terms of said ordinance. The offer and ruling of the Court thereon being as follows, to wit:

MR. HAND: Mr. Willoughby, I ask you what was done to your knowledge with reference to the return of the ten thousand dollars which had been deposited by the Vandegrift Construction Company prior to the enactment of the original franchise in evidence in this case to the Vandegrift Construction Company, after the passage of the ordinance and the filing of the acceptance and bond?

JUDGE KELLY: We object to the question as not competent; first, it assumes a fact not proven yet, to wit, that the Vandegrift Construction Company deposited ten thousand dollars with the People of Porto Rico, and it cannot be proven in this off-hand manner. Second, it is entirely immaterial and irrelevant whether there was ten thousand dollars deposited, and if so, what became of it, as far as any issue here is concerned.

MR. HAND: This is simply for the purpose of showing that the Executive Council complied with the provision in the ordinance which it was to comply with upon the compliance by the Vandegrift Construction Company with certain conditions.

THE COURT: Suppose you let them show they did not. I don't see that it is material at this state of the case.

(Exception noted for plaintiff, at whose request a bill is sealed.)

WHEREFORE, the plaintiff prays that the judgment of the Circuit Court of the United States for the Middle District of Pennsylvania may be reversed, and that the said Court be directed to grant a new trial of said cause.

WM. J. HAND,
*Attorney for Plaintiff in Error and
Plaintiff Below.*

(Endorsed: No. 66. October Term, 1906. The People of Porto Rico v. The Title Guaranty & Surety Company. Assignments of error. Filed, U. S. Cir. & Dist. Court, Middle Dist. of Pa., Jan. 8, 2:35 P. M., 1910, E. R. W. Searle, Clerk Wm. J. Hand, attorney for plaintiff in error.)

THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
THIRD CIRCUIT.

UNITED STATES OF AMERICA, ss.:

THE PRESIDENT OF THE UNITED STATES.

To the Title Guaranty and Suerty Company, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the City of Philadelphia within thirty days, pursuant to writ of error filed in the Clerk's Office of the Circuit Court of the United States, Middle District of Pennsylvania, wherein the People of Porto Rico is plaintiff and you are defendant in error to show cause, if any there be, why the judgment rendered against said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESSETH, the Honorable R. W. Archbald, U. S. District Judge, sitting as Circuit Judge of the Circuit Court of the United States at Scraton, within said circuit, and district, this 10th day of January, in the year of our Lord one thousand nine hundred and ten.

(Seal)

R. W. ARCHBALD,
U. S. District Judge.

Service of the within citation and receipt of a copy thereof admitted this tenth day of January, A. D. 1910, and the Clerk is authorized to enter our appearance of record for said defendant in error in the U. S. Circuit Court of Appeals for the Third Circuit.

WILLARD, WARREN & KNAPP,
Attorneys for Defendant in Error.

To the Clerk of U. S. Circuit Court of Appeals for the Third Circuit:

Enter my appearance of record for the plaintiff in error.

WM. J. HAND,
Attorney for Plaintiff in Error.

(Endorsed: Service of the within citation and receipt of a copy thereof admitted this tenth day of January, A. D. 1910, and the Clerk is authorized to enter our appearance of record for said defendant in error in the U. S. Circuit Court of Appeals for the Third Circuit. Willard, Warren & Knapp, attorneys for defendant in error. To the Clerk of U. S. Circuit Court of Appeals, for the Third Circuit: Enter my appearance of record for the plaintiff in error. Wm. J. Hand, attorney for plaintiff in error. Citation. Filed, U. S. Cir. & Dist. Court, Middle Dist. of Pa., Jan. 12, 5:32 P. M., 1910. E. L. W. Searle, Clerk.)

THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
THIRD CIRCUIT.

THE UNITED STATES OF AMERICA, ss.: ..

THE PRESIDENT OF THE UNITED STATES.

*To the Honorable the Judges of the Circuit Court of the
United States for the Middle District of Pennsyl-
vania, Greeting:*

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Circuit Court, before you, or some of you, between the People of Porto Rico, plaintiff, and The Title Guaranty and Surety Company, defendant, a manifest error hath happened, to the great damage of the said The People of Porto Rico, plaintiff, as by its complaint appears, we, being willing that error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at Philadelphia, in said circuit, within thirty days, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 10th day of January, A. D. 1910, and in the one hundred and thirty-fourth

year of the independence of the United States of America.

E. R. W. SEARLE,
*Clerk of the Circuit Court of the United States,
 Middle District of Pennsylvania.*

(Seal)

Per G. C. SCHENER,
Dep. Clerk.

Allowed by

R. W. ARCHBALD,
U. S. District Judge.

I hereby certify that a copy of the within writ of error was on the 10th day of January, 1910, lodged in the clerk's office of the United States Circuit Court for the Middle District of Pennsylvania, for the said defendant in error.

E. R. W. SEARLE,
*Clerk of the U. S. Circuit Court, Middle
 District of Pennsylvania.*

(Seal)

Per G. C. SCHENER,
Dep. Clerk.

(Endorsed: No. 66. Oct. Term, 1910. Writ of Error.
 Filed, U. S. Cir. & Dist. Court, Middle Dist. of Pa.,
 Jan. 10, 9:32 A. M., 1910. E. R. W. Searle, Clerk.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE THIRD CIRCUIT.

October Term, 1906. No. 66.

WRIT OF ERROR TO JUDGMENT OF UNITED STATES CIRCUIT
COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

The People of Porto Rico

v.

The Title Guaranty & Surety Company.

AGREEMENT AS TO PRINTING OF RECORD.

And now, January 20, 1910, it is agreed between counsel for the respective parties above named, that the following portions of the record in the above-entitled proceedings need not be printed by the Clerk, to-wit:

1st.—Warrant of attorney of plaintiff's attorney.

2nd.—Demurrer of defendant to plaintiff's statement.

3rd.—Demurrer of defendant to plaintiff's amended statement.

4th.—Order overruling demurrer and defendant's exceptions thereto.

5th.—Defendant's affidavit of defense.

6th.—Rule for judgment for want of a sufficient affidavit of defense.

7th.—It is agreed that the Exhibits appended to plaintiff's statement, to-wit, Exhibits A, B, C and D, being the bond and three ordinances enacted by the Executive Council of Porto Rico with reference to the Vandegrift Construction Company franchise, need not be printed, but instead thereof reference shall be made for the said Exhibits, to the Bill of Exceptions wherein

copies of the same appear as the said respective documents were offered in evidence at the trial. The said reference may be in the following form, to-wit:

"To the plaintiff's statement the following Exhibits are appended, reference being made for copies thereof to the Bill of Exceptions appearing below in the printed record, at the page indicated, to wit :

1. Exhibit A. Copy of "An ordinance granting to the Vandegrift Construction Company the right to build and operate a line of railway between the municipality of San Juan and the Playa of Ponce, in the Island of Porto Rico, and to develop electric energy by water or other power for distribution and sale for railway, lighting and industrial purposes." Passed by the Executive Council of Porto Rico on March 2, 1903; approved by the Governor of Porto Rico, March 3, 1903, and by President of the United States March 21, 1903. For copy of this ordinance see Bill of Exceptions, page of printed record, *supra*.

2. Exhibit B. Copy of bond of Vandegrift Construction Company as principal, and Union Surety & Guaranty Company, and the Title Guaranty & Trust Company of Scranton, Pa., as sureties to the People of Porto Rico, dated May 23, 1903. For copy of this bond see Bill of Exceptions, page of printed record, *supra*.

3. Exhibit C. Copy of an ordinance amending 'An ordinance granting to the Vandegrift Construction Company the right to build and operate a line of railway, etc., etc. Passed by the Executive Council of Porto Rico July 7, 1904; approved by the Governor of Porto Rico, July 18, 1904, and by the President of the United States, August 2, 1904.' For copy of this ordinance see Bill of Exceptions, page of the printed record, *supra*.

4. Exhibit D. Copy of 'An ordinance repealing An ordinance granting to the Vandegrift Construction Company the right to build and operate a line of rail-

way, etc. etc. Passed by the Executive Council of Porto Rico February 24, 1905, approved by the Governor of Porto Rico March 18, 1905, and by the President of the United States, May 12, 1905.' For copy of this ordinance see Bill of Exceptions, page of printed record, *supra*.

(Signed) WILLARD, WARREN & KNAPP,
Attorneys for Defendant in Error.

(Signed) WM. J. HAND,
Attorney for Plaintiff in Error.

(Endorsed: No. 66. October Term, 1906. The People of Porto Rico v. The Title Guaranty and Surety Company. Agreement of counsel as to printing of record. Filed, Jan. 21, 1910. E. R. W. Searle, Clerk.)

"And thereupon it is ordered by the Court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Third Circuit; and the same is transmitted accordingly.

"Teste:

(Seal)

E. R. W. SEARLE,
Clerk."

UNITED STATES OF AMERICA,
MIDDLE DISTRICT OF PENNSYLVANIA, } ss.:

I, Edward R. W. Searle, Clerk of the Circuit Court of the United States of America, for the Middle District of Pennsylvania, in the Third Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the foregoing pages, numbered from 1 to 282b, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of The People of Porto Rico, plaintiff in error, against the Title Guaranty and Surety Company, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court, to be hereunto affixed, at the City of Scranton, in the Middle District of Pennsylvania, in the Third Circuit, this 21st day of January, in the year of our Lord, one thousand nine hundred and ten, and of the independence of the United States the one hundred and thirty-fourth.

(Seal)

E. R. W. SEARLE,
Clerk.

In the United States Circuit Court of Appeals for the Third Circuit.
March Term, 1910.

No. 1341.

THE PEOPLE OF PORTO RICO, Plaintiff in Error,
vs.

THE TITLE GUARANTY & SURETY COMPANY, Defendant in Error.

And afterwards, to wit, on the sixth day of April, 1910, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs and the Court not being fully advised in the premises, takes further time for the consideration of the same.

And afterwards, to wit, on the fifteenth day of June, 1910, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

Opinion of the Court.

Filed August 4, 1910.

In the United States Circuit Court of Appeals for the Third Circuit.

No. 56, March Term, 1910.

THE PEOPLE OF PORTO RICO, Plaintiff in Error,
vs.

THE TITLE GUARANTEE AND SURETY COMPANY, Defendant in Error.

Appeal from the Circuit Court of the United States for the Middle
District of Pennsylvania.

Before Buffington and Lanning, Circuit Judges, and Bradford,
District Judge.

BUFFINGTON, J.:

In the court below the People of Porto Rico brought suit against the Title Guarantee & Surety Company on an indemnity bond in a hundred thousand dollars, conditioned as noted below. At the close of plaintiff's testimony that court granted a compulsory nonsuit, and on its refusal to take it off, plaintiff sued out this writ. The subject matter of the controversy; the possibility of the contract being governed by foreign laws; and the variety of questions suggested, have resulted in briefs of scholarly and unusually interesting character. But to our mind the crucial point of the case falls within such narrow limits and is ruled by such plain and well-established principles, that without entering into the tempting field of questions suggested, we confine ourselves to the precise one involved. By ordinance of March 2d, 1903, the People of Porto Rico, duly acting by

the Executive Council, granted to the Vandergrift Construction Company, a corporation, and the latter accepted, a franchise to construct a certain electric railway and electric works in the Island of Porto Rico. The ordinance was conditioned on the full completion of the railway and works within three years thereafter, and provided, by Section 30, that "The rights, privileges and concessions herein granted shall be subject to amendment, alteration or repeal by the Executive Council." After certain amendments not here material, as the surety company neither knew of nor assented thereto, the Executive Council, on February 24th, 1905, averring therein that "by the terms and conditions of said grant as the same was passed * * * and accepted by the said grantee, the said franchise, privilege or concession, and all of the rights, grants, or privileges thereunder or appertaining thereto, have been and now are, at the option of the Executive Council of Porto Rico, subject to revocation, forfeiture or repeal;" by ordinance enacted that the ordinance of March 2d, 1903 and "all the rights, privileges appertaining thereto, are hereby revoked and forfeited to the People of Porto Rico * * * under the general provisions of Section 30 of said ordinance." Whether such repeal was valid or otherwise, is a question not before us. That it was valid was and is the position of the People of Porto Rico,—that the right of repeal is "not limited as to occasion in any manner" is the language of its counsel,—and all parties have seemingly acquiesced in that view. The grantee of the franchise surrendered it and the Island re-acquired the grant. There is no proof in the case that it has suffered any damage from the non-exercise of the franchise by the Vandergrift Company, and it was stated at bar the railway was subsequently built by another grantee. As we have seen, the re-acquiring of it by the Island was more than a year before the three years expired which were given to build the works requisite to the use of the franchise. In this state of facts, the plaintiff sought by this suit to recover the penalty on this bond of the defendant, viz:

"Know all men by these presents, that we, the Vandergrift Construction Company, a corporation duly organized under the laws of the State of New Jersey, hereinafter called the Principal, as Principal, and The Union Surety and Guarantee Company, of Philadelphia, a corporation duly organized under the laws of the State of Pennsylvania, and The Title Guarantee and Trust Company, of Scranton, Pennsylvania, a corporation duly organized under the laws of the State of Pennsylvania, hereinafter called the Sureties, as Sureties, are held and firmly bound unto the People of Porto Rico, hereinafter called the Obligee, in the sum of One Hundred Thousand Dollars, good and lawful money of the United States, for the payment whereof said Principal binds itself and its successors, and said Sureties bind themselves and their successors jointly and severally firmly by these presents.

Whereas, by virtue of a certain ordinance enacted by the Executive Council of Porto Rico, on the 2nd day of March, 1903, and approved by the Governor of Porto Rico on the 3rd day of March, 1903, granting to said Principal the right to build and operate a line

of railway between the Municipality of San Juan and the Playa of Ponce in the Island of Porto Rico, and to develop electric energy by water or other power for distribution and sale for railway, lighting and industrial purposes, a copy of which ordinance is hereto annexed, the said Principal has undertaken and agreed to build and put in operation a line of railway between the Municipality of San Juan and the Playa of Ponce, in the Island of Porto Rico, and to build and equip power plants to develop electric energy for the operation of said railway and for other purposes within the period of three years from the date of the acceptance of the said ordinance by the said Principal.

Now, therefore, the condition of this obligation is such that if the said Principal shall within three years from the date of the acceptance by it of said ordinance fully complete the work therein authorized in accordance with the conditions therein contained and in accordance with the plans and specifications therefor approved as therein provided; and within the said period of three (3) years from the date of the acceptance by it of the said ordinance shall build, complete and have in operation the entire line of railway authorized therein for such terminal in the Municipality of San Juan as may be determined by the said Executive Council to its terminal on the Playa of Ponce on a route from Ponce to be determined by the said Executive Council in accordance with the conditions in said ordinance contained, and in accordance with the plans and specifications therefor approved, as in said ordinance provided, and within the said period of three (3) years from the date of the acceptance by it of the said ordinance, shall also complete and have in operation the entire power plant and transmission lines necessary for operation the said entire line of railway, in accordance with the plans and specifications therefor approved as therein provided; and shall duly perform within the said period of three (3) years, all other terms and conditions in said ordinance required to be performed by the Principal within the same period; and shall pay to the obligee any loss or damage accruing against the said obligee by reason of the construction of the works in said ordinance authorized at any time during the period of construction therein limited and before the completion of said work shall have been certified by the Commissioner of the Interior, as in Section 35 of said ordinance provided,—then this obligation shall be void, otherwise to remain in full force and effect."

Such being the condition of its undertaking, can the obligee in the bond who has without the knowledge or consent of the surety repealed the franchise, still hold the surety in damages for the non-completion of a railway which possession of the franchise alone enabled the principal to lawfully build? We think the statement of the question is its own answer. This bond was given for the performance of work which could only be done under the franchise. The continuance of the franchise by the plaintiff was therefore an implied prerequisite to its calling on the surety to perform. To hold otherwise would be to say that if the obligee a year, a month or a day after the franchise was granted, repealed it, it could still hold

the surety to build the disfranchised road. It would in effect be demanding bricks without furnishing straw, be contrary to the common sense of right and wholly at variance with the uniform holdings of Courts. In the *United States vs. Arrendondo*, 31 U. S. 744, there came in question, after the cession of Florida to the United States, the validity of a land grant made while Florida was owned by Spain. Such grant was coupled with the condition of the grantees settling two hundred Spanish families on the land. It was contended by the United States, as successor to the title of Spain, that the grant was forfeited because "The grantee failed to perform the condition of the grant, which required them to commence the establishment of the two hundred Spanish families on the land, within three years from the date of the grant." In answer to this the Court said: "The condition of settling two hundred families on the land has not been complied with in fact; the question is, has it been complied with in law, or has such matter been presented to the court as dispenses with the performance, and diverts the grant of that condition. It is an acknowledged rule of law, that if a grant be made on a condition subsequent, and its performance become impossible by the act of the grantor, the grant becomes single. We are not prepared to say that the condition of settling two hundred Spanish families in an American territory has been, or is, possible; the condition was not unreasonable or unjust at the time it was imposed; its performance would probably have been deemed a very fair and adequate consideration for the grant, had Florida remained a Spanish province. But to exact its performance, after its cession to the United States, would be demanding the "summum jus" indeed, and enforcing a forfeiture, on principles which, if not forbidden by the common law, would be utterly inconsistent with its spirit. If the case required it, we might feel ourselves, at all events, justified, if not compelled, to declare, that the performance of this condition had become impossible by the act of the grantors—the transfer of the territory, the change of territory, the change of government, manners, habits, customs, laws, religion, and all the social and political relations of society and of life." Indeed, the statement in 4 Ency. 687 that "Whenever by the act of the obligee performance of the condition is rendered impossible, the obligee will be excused from liability for non-performance," summarizes the law on the subject. In *Dwellely vs. Dwellely* 145 Mass. 509, it was held that where an obligee sought to sell real property under a bond and mortgage, conditioned for maintenance of the obligee, that as the contract contemplated such maintenance should be furnished on the land in question, the obligee, who had left the land, was not entitled to foreclose for non-maintenance. To the same effect are *McKillip vs. McKillip* 8 Barbour 255, and *Howe vs. Hose* 10 N. H. 89. In *Stewart vs. Cuyler* 17 Barbour 482, a bond was given which provided in case of a dispute as to the amounts to be periodically paid for support, for a reference to a county Judge for determination. The obligee, having requested the Judge not to act, it was held he could not recover for breach of the bond. And in *Pinder vs. Upton* 44 N. H. 358, it was said: "It is a settled principle, that whenever by the terms or nature of a condi-

tion, it cannot be performed without the precedent or concurrent act of the obligee, and he neglects or refuses to perform such act, the condition is saved." So also in *The People vs. Bartlett & Hill* 570, it was said: "Baron Comyn lays down the rule that the performance of a condition shall be excused by an obstruction of the obligee or by an interruption of the performance by him;" citing *Com. Dig. Title Condition* (L. 8). Moreover performance by the surety company became impossible not only by the hindrance of the obligee but also by the act of law, which as it is sometimes expressed "repeals the covenant." "When a party," holds *Bradford vs. Jenkins* 41 *Miss.* 334, "agrees to do a particular thing which is lawful at the time, and the legislature comes in and makes it unlawful, here the law absolves from the obligation, or, as sometimes expressed, 'repeals the covenant.'" This has the support of authority; "If the condition be possible at the time of making it and afterwards becomes impossible by the act of God, the act of law, or the act of the obligee himself, then the penalty of the obligation is saved; for no prudence or foresight of the obligor could guard against such a contingency," *Blackstone's Commentaries* 341; *Iron vs. Hume* 50 *Miss.* 426, and *Bain vs. Lysle* 68 *Pa.* 60, where it was held "If by act of law the performance of the condition becomes impossible, upon every principle the bond is saved: *Co. Litt.* 206, a." Applying these principles to the case in hand, it is clear there can be no recovery on this bond. Both by the act of obligee and by act of law it became impossible, before the three years' leeway of the bond, for either principal or surety to lawfully build this road. The power to repeal was reserved and exercised. By that repeal the right of the construction company to, within the three years' term of the bond, complete this road was taken away. Possibly, for there is no proof to the contrary, the surety could have constructed the road within the three years, and the prevention thereof by the repeal of this ordinance presumably injuriously affected the rights of the surety. "A surety may be discharged by the doing of an act which is legally injurious to the surety, or which impairs his legal rights"; *Dwelling House Co. vs. Johnston* 90 *Mich.* 170. Such being the law and the Island having seen fit to repeal this ordinance, and thereby materially and adversely affect the legal rights of the surety without its consent, it follows the surety was released. The repeal of the franchise put an end to the undertaking of the construction company and rendered it impossible for it or its surety to thereafter lawfully construct the work for which this bond was conditioned. The general rule, supported by the best elementary writers, is that "when an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed"; *Ex Parte McArdle* 7 *Wallace* 510. These authorities conclusively settle this case of the bond in suit, which was executed, acknowledged and delivered by the surety company in Pennsylvania, is a Pennsylvania contract. If it be deemed a Porto Rican contract we have been referred to no Spanish or other authorities which hold to the contrary. The judgment is therefore affirmed.

In the United States Circuit Court of Appeals for the Third Circuit,
March Term, 1910.

No. 1341 (List No. 56).

THE PEOPLE OF PORTO RICO, Plaintiff in Error,

vs.

THE TITLE GUARANTY & SURETY COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the Middle
District of Pennsylvania.

This cause came on to be heard on the transcript of record from
the Circuit Court of the United States, for the Middle District of
Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged
by this Court, that the judgment of the said Circuit Court in this
cause be, and the same is hereby affirmed with costs.

W. M. LANNING,
Circuit Judge.

August 23, 1910.

(Endorsed: 1341. Order Affirming Judgment. Received &
Filed Aug. 23, 1910. Saunders Lewis, Jr., Clerk.)

In the United States Circuit Court of Appeals for the Third Circuit,
March Term, 1910.

No. 1341 (List No. 56).

THE PEOPLE OF PORTO RICO, Plaintiff in Error,

vs.

THE TITLE GUARANTY & SURETY COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the Middle
District of Pennsylvania.

And now, to wit, this 23rd day of August, A. D. 1910, it is ordered
that Mandate issue to the said Circuit Court of the United States, for
the Middle District of Pennsylvania in accordance with the Opinion
and judgment of this Court in said cause.

W. M. LANNING,
Circuit Judge.

(Endorsed: 1341. Order for Mandate. Received & Filed Aug.
23, 1910. Saunders Lewis, Jr., Clerk.)

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Circuit Court of the United States for the Middle District of Pennsylvania, Greeting:

Whereas, lately in the Circuit Court of the United States for the Middle District of Pennsylvania, before you or some of you, in a cause between The People of Porto Rico, Plaintiff in Error, and The Title Guaranty and Surety Company, Defendant in Error, a judgment was duly entered on the thirty-first day of December, 1909, which judgment is of record in the office of the Clerk of the said Circuit Court, to which reference is hereby made, and the same is expressly made a part hereof, as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the United States Circuit Court of Appeals for the Third Circuit by virtue of a writ of error, agreeably to the act of Congress, in such case made and provided, more fully and at large appears.

And whereas, in the present term of March, in the year of our Lord one thousand nine hundred and ten, the said cause came on to be heard before the said United States Circuit Court of Appeals on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed with costs, and that the said Defendant in Error, The Title Guaranty and Surety Company, recover against the said Plaintiff in Error, the People of Porto Rico, the sum of Twenty Dollars (\$20.00), for its costs herein expended, and have execution therefor.

Philadelphia, August 23, 1910.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness, the Honorable John M. Harlan, Senior Associate Justice of the Supreme Court of the United States, at Philadelphia, the fourteenth day of September, in the year of our Lord one thousand nine hundred and ten.

Costs of The Title Guaranty and Surety Company.

Clerk	\$.....
Printing Record
Attorney	20.00
	<hr/>
	\$20.00

[SEAL.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of
Appeals, Third Circuit.

(Endorsed: Original File No. 1341. U. S. Circuit Court of Appeals, Third Circuit. No. 65, March Term, 1910. The People of Porto Rico Plaintiff in Error vs. The Title Guaranty & Surety Company, Defendant in Error. Mandata. Received & Filed Sep. 15, 1910. Saunders Lewis, Jr., Clerk.)

The United States Circuit Court of Appeals, Third Circuit.

No. 1341.

THE PEOPLE OF PORTO RICO, Plaintiff in Error,

VS.

THE TITLE GUARANTY AND SURETY COMPANY, Defendant in Error.

Assignment of Errors.

And now comes the plaintiff in error, The People of Porto Rico, by William J. Hand, its attorney, and says that in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Third Circuit, in the above entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said plaintiff in error in this to wit:

First. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the Circuit Court of the United States for the Middle District of Pennsylvania, discharging the rule to show cause why the compulsory non-suit entered at the trial should not be taken off, and giving judgment in favor of the defendant in error for costs, entered December 29th, 1909.

Second. Said Circuit Court of Appeals erred in not reversing the said judgment of the United States Circuit Court aforesaid, and in not remanding said cause to said Circuit Court for a new trial.

Third. Said Circuit Court of Appeals erred in not sustaining the first assignment of error upon the record in said cause, the same being as follows, to wit:

First. The United States Circuit Court in and for the Middle District of Pennsylvania, erred in refusing to take off the compulsory non-suit entered by the Court, the order of the Court being as follows:

"Now, December 29, 1909, this cause coming on to be heard on rule to show cause why the compulsory non-suit entered at the trial should not be taken off, and a new trial awarded, and having been argued by counsel for the respective parties, upon due consideration thereof it is thereupon

Ordered and adjudged that the rule to show cause be and the same is hereby discharged and judgment is directed to be entered in favor of the defendant for costs, to which refusal to take off said non-suit and the direction of judgment in favor of the defendant the plaintiff excepts.

(Signed)

R. W. ARCHBALD,
District Judge."

Fourth. Said Circuit Court of Appeals erred in not sustaining the third assignment of error upon the record in said cause, the same being as follows, to wit:

Third. The said Court erred in refusing to permit the counsel for plaintiff in error to introduce in evidence the following document offered by the plaintiff, to wit, the assignment dated October 8, 1904, from the Vandegrift Construction Company to the Porto Rico Railway, Light & Power Company, marked and identified as "Plaintiff's Exhibit L," which offer and the ruling of the Court thereon was as follows, to wit:

Mr. HAND: We offer to prove the execution of an assignment by the Vandegrift Construction Company, dated October 8, 1904, assigning to the Porto Rico Railway, Light & Power Company the privileges, franchises, rights, grants and concessions given and granted to the Vandegrift Construction Company by the Executive Council of Porto Rico, by an ordinance adopted by the Executive Council on the 7th day of July, 1904, amending the original grant or franchise to the Vandegrift Construction Company, adopted by the Executive Council March 2, 1903.

Judge KELLY: We object to the proof of the execution of this paper because it is immaterial and irrelevant and incompetent to prove or tending to prove any fact material to the issue now before the Court.

The COURT: The objection is overruled.

(Exception noted for defendant, at whose request a bill is sealed.)

By Mr. HAND:

Q. I show you paper marked "Plaintiff's Exhibit L;" is that your signature as president of the Vandegrift Construction Company?

A. Yes, sir.

Q. You were president of the Vandegrift Construction Company, were you, at that time?

A. Yes, sir.

Q. To whom was this paper delivered?

Judge KELLY: We object to that as immaterial.

A. I don't remember to whom it was delivered.

Mr. HAND: You remember that it was delivered to the Porto Rico Railway, Light and Power Company?

Judge KELLY: I object to that as immaterial and irrelevant.

The COURT: Prove this paper first before you deliver it.

Judge KELLY: Your company had a seal?

A. Yes, sir.

Q. A regular seal with an impression?

A. Yes, sir.

Q. In other words, the impression on the paper last showed to you showed the seal of your company.

A. That is the seal of our company.

By Mr. HAND:

Q. Did you acknowledge this instrument as president of the Vandegrift Construction Company?

A. I don't remember now whether I acknowledged it or not.

Q. There is a signature; who is that?

A. Ralph Rounds.

Q. Did you go before Ralph Rounds and acknowledge that paper?

A. I couldn't say that either.

Q. Who was Ralph Rounds?

A. He was an attorney and commissioner for Porto Rico; he is, I suppose; he is an attorney in New York.

Q. Was he an attorney for the Porto Rico Light and Power Company and for the Vandegrift Construction Company?

Judge KELLY: We object to that as immaterial.

By Mr. HAND:

Q. Isn't it a fact he acted as attorney for both companies?

A. His firm acted as attorney for both companies; yes, sir.

Q. Where was this acknowledgment taken?

Judge KELLY: The gentleman has said he don't remember.

By Mr. HAND:

Q. Where were you when you signed that paper, October 8, 1904?

A. I don't know whether I was in New York or Philadelphia, or where I was; it purports to have been taken in New York.

Q. Will you swear you didn't appear before Mr. Rounds and acknowledge that paper in New York on the 8th of October?

A. No, I will not swear I did or did not.

Q. Have you any way of refreshing your recollections as to where you were on the 8th of October, 1904?

A. Not here I have not; no, sir.

(The counsel for the plaintiff offer the paper in evidence.)

Judge KELLY: We object to the offer as incompetent, irrelevant and immaterial. There is no authority shown in the president of the company to execute the paper; and there is no offer to show any authority from the company to the president to execute the paper. There is no seal of the company attached to this paper, which might be argued to give it prima facie authenticity. There is no certificate of the seal of the commissioner for Porto Rico upon or attached to the purporting acknowledgment of the paper; no certificate of the fact that Ralph S. Rounds was a commissioner for Porto Rico at the time. The paper is therefore incompetent and of no force and effect to the prejudice of this defendant in this issue.

The COURT: I sustain the objection. That is to say, to this extent: I think that you have got to prove the authority to execute.

Mr. HAND: By what authority did you execute this paper?

Judge KELLY: We object to that as not competent; the only authority that could be given to this man as president of the company

to execute the paper would necessarily be of some sort of corporate action or by by-laws, perhaps. It is therefore incompetent for them to show authority in this way.

Mr. HAND: The evidence of the witness will show to what extent he had authority.

The COURT: You are supposed to know before you ask the question.

Mr. HAND: We offer to show by the witness that he had authority from the board of directors of the corporation to execute this paper.

Judge KELLY: We ask the gentleman to incorporate in his offer how he proposes to show that, whether by minutes of the board of directors or the mere say so of the witness.

Mr. HAND: By showing the witness' authority as president of the company and his other acts as president ratified by the board, and that he was authorized as president of the company to make this assignment, inasmuch as the company had already executed the assignment of the original franchise to the Porto Rico Railway, Light & Power Company, and that this was in furtherance of that assignment which has already been offered and received in evidence.

Judge KELLY: I renew the objection to the offer.

The COURT: I sustain the objection.

(Exception noted for plaintiff, at whose request a bill is sealed.)

The paper offered in evidence was in words and figures as follows, to wit:

"Plaintiff's Exhibit L," offered and rejected by the Court, is as follows:

"Know all men by these presents, that Vandegrift Construction Company, a New Jersey corporation, in consideration of one dollar to it in hand paid by Porto Rico Railway, Light & Power Company, a New Jersey corporation, and other valuable considerations, has bargained, sold, assigned, transferred, conveyed and set over, and does hereby bargain, sell, assign, transfer, convey and set over, unto the said Porto Rico Railway, Light & Power Company, its successors and assigns, all the privileges, franchises, rights, grants and concessions given and granted to the said Vandegrift Construction Company by the Executive Council of Porto Rico, by an ordinance adopted by the Executive Council at a meeting thereof held on the 7th day of July, A. D. 1904, amending a certain other ordinance adopted by the said Executive Council at a meeting thereof held on the 2nd day of March, A. D. 1903, and entitled 'An ordinance granting to the Vandegrift Construction Company the right to build and operate a line of railway between the Municipality of San Juan and the Playa of Ponce in the Island of Porto Rico and to develop electric energy by water or other power for distribution and sale for railway, lighting and industrial purposes,' and also all privileges, franchises, rights, grants and concessions given and granted to the said Vandegrift Construction Company by any other extensions or amendments of the said franchise of March 2, 1903, and also all such privileges, franchises, rights, grants and concessions given and granted to the said company by the said Executive Council by the said ordinance of March 2, 1903, as extended and modified by said

ordinance of July, 1904, and all rights and privileges under said ordinance as extended and amended, and all property, interests and rights thereby granted or conveyed; and said Vandegrift Construction Company hereby confirms, releases and grants to the said Porto Rico Railway, Light & Power Company full right and title in and to the said ordinance of March 2, 1903, and all rights, privileges and property granted thereby.

"To have and to hold all the said privileges, franchises, rights, grants, concessions and property unto the said Porto Rico Railway, Light & Power Company, its successors and assigns forever; subject, however, to the terms, conditions, agreements, stipulations and royalties in the said ordinances or any of them contained, to the observance and performance of all of which the said Porto Rico Railway, Light & Power Company is hereby obligated and bound.

"In witness whereof, the said Vandegrift Construction Company has caused its corporate seal to be hereunto affixed and these presents to be signed by its president this 8th day of October, 1904.

"VANDEGRIFT CONSTRUCTION COMPANY,

"By J. A. VANDEGRIFT, *President.*"

"STATE OF NEW YORK,

County of New York, ss:

"On the 8th day of October, 1904, before me personally came Joseph A. Vandegrift, to me known, who being by me duly sworn, did depose and say that he resided in Philadelphia, Pennsylvania; that he is the president of the Vandegrift Construction Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

[SEAL.]

"RALPH S. ROUNDS,
"*Commissioner of Porto Rico.*"

Fifth. Said Circuit Court of Appeals erred in not sustaining the fourth assignment of error upon the record in said cause, the same being as follows, to wit:

Fourth. The said Court erred in refusing to permit counsel for plaintiff in error to show by W. F. Willoughby, a witness called on behalf of plaintiff, certain facts tending to show an implied acceptance on the part of the Porto Rico Railway, Light & Power Company, assignee of the Vandegrift Construction Company, of the terms of the so-called amending ordinance. The offer and ruling of the Court being as follows:

Mr. HAND: We propose to show by the witness on the stand that the amending ordinance was enacted in pursuance of a petition from Porto Rico Railway, Light & Power Company requesting an extension of time within which to do the work provided to be done within one year from the date of acceptance of the original ordinance; that subsequent to the enactment of the amending ordinance

the assignee of the original grantee, to wit, the Porto Rico Railway, Light & Power Company, went on and exercised the rights granted by the ordinance as amended, to wit, in relation to the construction of the railroad provided thereby, and that subsequently, to wit, about the month of December, 1904, they presented to the Executive Council of Porto Rico a petition asking for other amendments to the ordinance. This for the purpose of showing an implied acceptance on the part of the Porto Rico Railway, Light & Power Company, the assignee of the original grantee, of the terms of the so-called amending ordinance.

Mr. WARREN: We object to the offer and ask the counsel for plaintiff to let us see the petition which they propose to show by the witness. The offer is objected to as incompetent. We also object to this offer as incompetent and immaterial, generally and specifically, because there was no right in the original ordinance, so-called, to permit of any amendment or alteration of its terms; that the statement in one of the sections thereof, giving to the legislative council the alleged right, was in violation of the laws of Porto Rico governing such council, and the effort to change the contract between the Vandegrift Construction Company and the Government of Porto Rico, in such a way was illegal. We further object because this is an effort to show, so far as we can grasp it, that the Porto Rico Railway, Light & Power Company undertook to get a change in the contract it assumed as the assignee of the Vandegrift Construction Company, and any of its acts in connection therewith materially altering the contract that had been made with the Vandegrift Construction Company without this defendant's knowledge and consent cannot bind it, particularly in the absence of the knowledge or consent of the Vandegrift Construction Company, and as it has to do with matters which the legislative body could not do in any way which it is pretended they did by the paper offered in evidence here. Further that the facts offered to be proven for the purpose of showing an acceptance do not and would not show an acceptance.

The COURT: I will sustain the objection.

(Exception noted for plaintiff, at whose request a bill is sealed.)

Sixth. Said Circuit Court of Appeals erred in not sustaining the fifth assignment of error upon the record in said cause, the same being as follows, to wit:

Fifth. The Court erred in refusing to permit the counsel for the plaintiff in error to show by the witness, John S. Elliott, that there were, by the so-called original ordinance, valuable rights and concessions reciprocally granted by the grantee to the People of Porto Rico; and that, therefore, the People of Porto Rico had a proprietary interest in the subject of the grant and in the building of the road by the grantee. The offer and ruling of the Court thereon being as follows:

Mr. HAND: About how many men are there on the insular police force of Porto Rico?

Mr. WARREN: We object to the question as incompetent.

The COURT: What is the purpose of the question?

Mr. HAND: The purpose of the question, to be followed by other

questions of a similar nature with reference to the rights to be granted in this ordinance by the Vandegrift Construction Company, its successors and assigns to the People of Porto Rico in connection with the railway, is to show that the subject matter of the grant was a matter of contract under the proprietary rights of the People of Porto Rico, and that the People of Porto Rico were interested in their proprietary and private capacity in the building of this road by the grantee.

THE COURT: What has that got to do with this law suit?

MR. HAND: Simply to negative, in the first place, any possible contention that the penalty named in the bond is a mere statutory penalty imposed by legislative authority without any regard to the possible damage that might accrue to the People of Porto Rico; and to show that this is in effect a suit of a civil nature, and not for a mere statutory penalty.

THE COURT: I don't think that any advice that we can get out of the facts you propose to prove would establish anything else than that this was a civil suit. You are suing for damages; you claim \$100,000 on the bond, that being the sum named in the bond. I don't see how the question you have now asked Mr. Elliott has any bearing upon that unless it be that you propose to show some elements of damage to get into the question of elements of damage to make out something within the \$100,000.

MR. HAND: That is not the purpose. It is simply to show that this is not a mere grant of a franchise without any valuable rights and concessions being reciprocally granted to the People of Porto Rico.

THE COURT: I will sustain the objection.

MR. HAND: Will you tell us where the prisons are located in Porto Rico with reference to the line of this proposed railway and where the courts were held?

MR. WARREN: I ask for an offer.

THE COURT: You ask this question in view of the provision of the ordinance that this railroad was to transport the prisoners free. Is that it?

MR. HAND: Yes.

THE COURT: What is the purpose?

MR. HAND: Simply to show that there were valuable reciprocal grants provided to be made in the ordinance by the grantee and which were made in pursuance of the acceptance of the terms and conditions of the ordinance to the People of Porto Rico, for the purpose of showing that this is a suit of a civil nature and not merely a suit for the enforcement of any penal law.

MR. WARREN: We don't interpose any objection to the government of Porto Rico through their counsel here showing any actual damages they sustained by reason — the failure on the part of the Vandegrift Construction Company or its assignee, as the paper of assignment says, within the time that they were permitted to try to carry out the grant.

THE COURT: Either in this respect or in any other found in the contract?

MR. WARREN: As to anything. We don't say they ought to be precluded, and we don't oppose their proof of actual loss they sustained.

THE COURT: Does the plaintiff wish to introduce the testimony for this purpose?

MR. HAND: No; we do not. The offer is for the purpose of showing that there were by this ordinance valuable rights and concessions reciprocally granted by the grantee to the People of Porto Rico, and that, therefore, they had a proprietary interest in the subject of the grant.

THE COURT: Is that objected to?

MR. WARREN: We object to it as immaterial.

THE COURT: I will sustain the objection.

(Exception noted for the plaintiff, at whose request a bill is sealed.)

Seventh. Said Circuit Court of Appeals erred in not sustaining the sixth assignment of error upon the record in said cause, the same being as follows, to wit:

Sixth. The Court erred in refusing to permit the counsel for the plaintiff in error to show by the witness, W. F. Willoughby, that the \$100,000 deposited with the plaintiff by the Vandegrift Construction Company was returned to the latter after the passage of the original ordinance, and the filing of the acceptance and bond by said Vandegrift Construction Company, as provided by the terms of said ordinance. The offer and ruling of the Court thereon being as follows, to wit:

MR. HAND: Mr. Willoughby, I ask you what was done to your knowledge with reference to the return of the ten thousand dollars which had been deposited by the Vandegrift Construction Company prior to the enactment of the original franchise in evidence in this case to the Vandegrift Construction Company, after the passage of the ordinance and the filing of the acceptance and bond?

JUDGE KELLY: We object to the question as not competent; first, it assumes a fact not proven yet, to wit, that the Vandegrift Construction Company deposited ten thousand dollars with the People of Porto Rico, and it cannot be proved in this off-hand manner. Second, it is entirely immaterial and irrelevant whether there was ten thousand dollars deposited, and if so, what became of it, as far as any issue here is concerned.

MR. HAND: This is simply for the purpose of showing that the Executive Council complied with the provision in the ordinance which it was to comply with upon the compliance by the Vandegrift Construction Company with certain conditions.

THE COURT: Suppose you let them show they did not. I don't see that it is material at this state of the case.

(Exception noted for plaintiff, at whose request a bill is sealed.)

Wherefore, the said The People of Porto Rico, plaintiff in error, prays that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above entitled cause to the prejudice of the plaintiff in error, the said judgment of the said United States Circuit Court of Appeals be reversed, annulled, and for naught esteemed, and that said cause be remanded

to the United States Circuit Court for the Middle District of Pennsylvania, with instructions to grant a new trial in said cause, or for such further proceedings in said cause as may be determined upon by this honorable court, to the end that justice may be done in the premises.

WM. J. HAND,
Attorney for Plaintiff in Error.

Received & filed Oct. 12, 1910.

SAUNDERS LEWIS, JR., *Clerk.*

United States Circuit Court of Appeals for the Third Circuit.

No. 1341.

THE PEOPLE OF PORTO RICO, Plaintiff in Error,
vs.

THE TITLE GUARANTY AND SURETY COMPANY, Defendant in Error.

Petition for Writ of Error.

Your petitioner, The People of Porto Rico, plaintiff in error in the above entitled cause, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Third Circuit, and that a judgment has therein been rendered on the fourth day of August, 1910, affirming a judgment of the Circuit Court of the United States for the Middle District of Pennsylvania, and that the matter in controversy in said suit exceeds one thousand dollars, besides costs, and that the jurisdiction of none of the courts above mentioned is or was dependent in any wise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of the different states, and that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error; and therefore your petitioner would respectfully pray that a writ of error be allowed it in the above entitled cause, directing the clerk of the United States Circuit Court of Appeals for the Third Circuit to send the record and proceedings in said cause with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said plaintiff in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

THE PEOPLE OF PORTO RICO,
Plaintiff in Error,

By Its Attorney, FOSTER V. BROWN,
Att. Gen'l of Porto Rico.

WM. J. HAND.

The foregoing petition is granted and writ of error allowed as prayed for upon plaintiff's giving bond according to law in the sum of \$500.

WILLIAM R. DAY,

*Associate Justice of the Supreme
Court of the United States.*

Received & Filed Oct. 12, 1910.

SAUNDERS LEWIS, JR., *Clerk.*

Bond on Writ of Error.

Know all men by these presents, That we, The People of Porto Rico, as principal, and American Surety Company of New York, as sureties, are held and firmly bound unto The Title Guaranty and Surety Company, a corporation of the State of Pennsylvania, in the full and just sum of Five Hundred (\$500.00) dollars, to be paid to the said The Title Guaranty and Surety Company, its certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twelfth day of October, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a Circuit Court of Appeals for the Third Circuit in a suit depending in said Court, between The People of Porto Rico, Plaintiff, and The Title Guaranty and Surety Company, Defendant, a judgment was rendered against the said The People of Porto Rico, Plaintiff, and the said The People of Porto Rico having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Title Guaranty and Surety Company, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said The People of Porto Rico shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE PEOPLE OF PORTO RICO, [SEAL.]
By FOSTER V. BROWN, [SEAL.]

Attorney Gen'l.

AMERICAN SURETY CO. OF NEW
YORK, [SEAL.]

By EDW. P. BAILEY,

Resident Vice President.

Attest:

M. E. NEVILLE,

Resident Ass't Secretary.

Sealed and delivered in presence of:

F. M. CAMPBELL.

Approved by—

WILLIAM R. DAY,

*Associate Justice of the Supreme Court
of the United States.*

Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.

The first quarterly meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Wednesday, January 19, 1910, at 12 O'Clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees of the American Surety Company of New York.

"GENTLEMEN: The Committee appointed by the Executive Committee of this Company at their meeting held Tuesday, December 14, 1909, for the purpose of nominating officers of the Company, * * * for the ensuing year, beg leave to report as follows:

"We nominate for * * *

Place.	Resident Vice Presidents.	Resident Assistant Secretaries.
Philadelphia, Pa.	Samuel S. Sharp.	Robert R. Benedict.
	Stephen W. White.	Edw. P. Bailey.
	Wm. R. Nicholson.	W. Scott Reig.
	Robert R. Benedict.	M. E. Neville.
	Edw. P. Bailey.	A. C. Robinson.
		Carl B. Weed.

* * * * *

"Whereupon, it was resolved, that the Secretary be authorized to cast one ballot on behalf of the Trustees present for the officers, members of Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, and Counsel, as recommended by the Nominating Committee for the ensuing year; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year.

* * * * *

"The following resolution was adopted:

Resolved, that the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by the Resident Assistant Secretary."

STATE OF NEW YORK,
County of New York, ss:

I, H. A. Reiss, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts

and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 24th day of January, 1910.

[SEAL.]

H. A. REISS,
Assistant Secretary.

(Endorsed: 1341. Bond on Appeal to Supreme Court. Received & Filed Oct. 13, 1910. Saunders Lewis, Jr., Clerk.)

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between The People of Porto Rico, Plaintiff in Error, and The Title Guaranty and Surety Company, Defendant in Error, a manifest error hath happened, to the great damage of the said The People of Porto Rico, Plaintiff in Error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable John M. Harlan, Senior Associate Justice of the Supreme Court of the United States, the 13th day of October, in the year of our Lord one thousand nine hundred and ten.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

WILLIAM R. DAY,

*Associate Justice of the Supreme Court
of the United States.*

[Endorsed:] The People of Porto Rico, Plaintiff in Error, vs. The Title Guaranty and Surety Company, Defendant in Error. Writ of Error. Received Oct. 13, 1910. Saunders Lewis, Jr., Clerk.

UNITED STATES OF AMERICA, ss:

To The Title Guaranty and Surety Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Third Circuit, wherein The People of Porto Rico is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William R. Day, Associate Justice of the Supreme Court of the United States, this 13th day of October, in the year of our Lord one thousand nine hundred and ten.

WILLIAM R. DAY,
*Associate Justice of the Supreme Court
of the United States.*

[Endorsed:] 1341. The People of Porto Rico, Plaintiff in Error,
vs. The Title Guaranty & Surety Company, Defendant in Error.
Citation.

Service of within citation accepted. Copy received Oct. 15, 1910.

WARREN, KNAPP & O'MALLEY,
*Att'ys pro Title Guaranty &
Surety Co., Def't in Error.*

UNITED STATES OF AMERICA,
*Eastern District of Pennsylvania,
Third Judicial Circuit, act:*

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this Court in the case of The People of Porto Rico, Plaintiff in Error, vs. The Title Guaranty and Surety Company, Defendant in Error, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 22nd day of October in the year of our Lord one thousand nine hundred and ten and of the Independence of the United States the one hundred and thirty fourth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

Endorsed on cover: File No. 22,364. U. S. Circuit Court Appeals, 3d Circuit. Term No. 743. The People of Porto Rico, plaintiffs in error, vs. The Title Guaranty and Surety Company. Filed October 28th, 1910. File No. 22,364.

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No. 154.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1912

~~No. 154~~

THE PEOPLE OF PORTO RICO

Plaintiff in Error

vs.

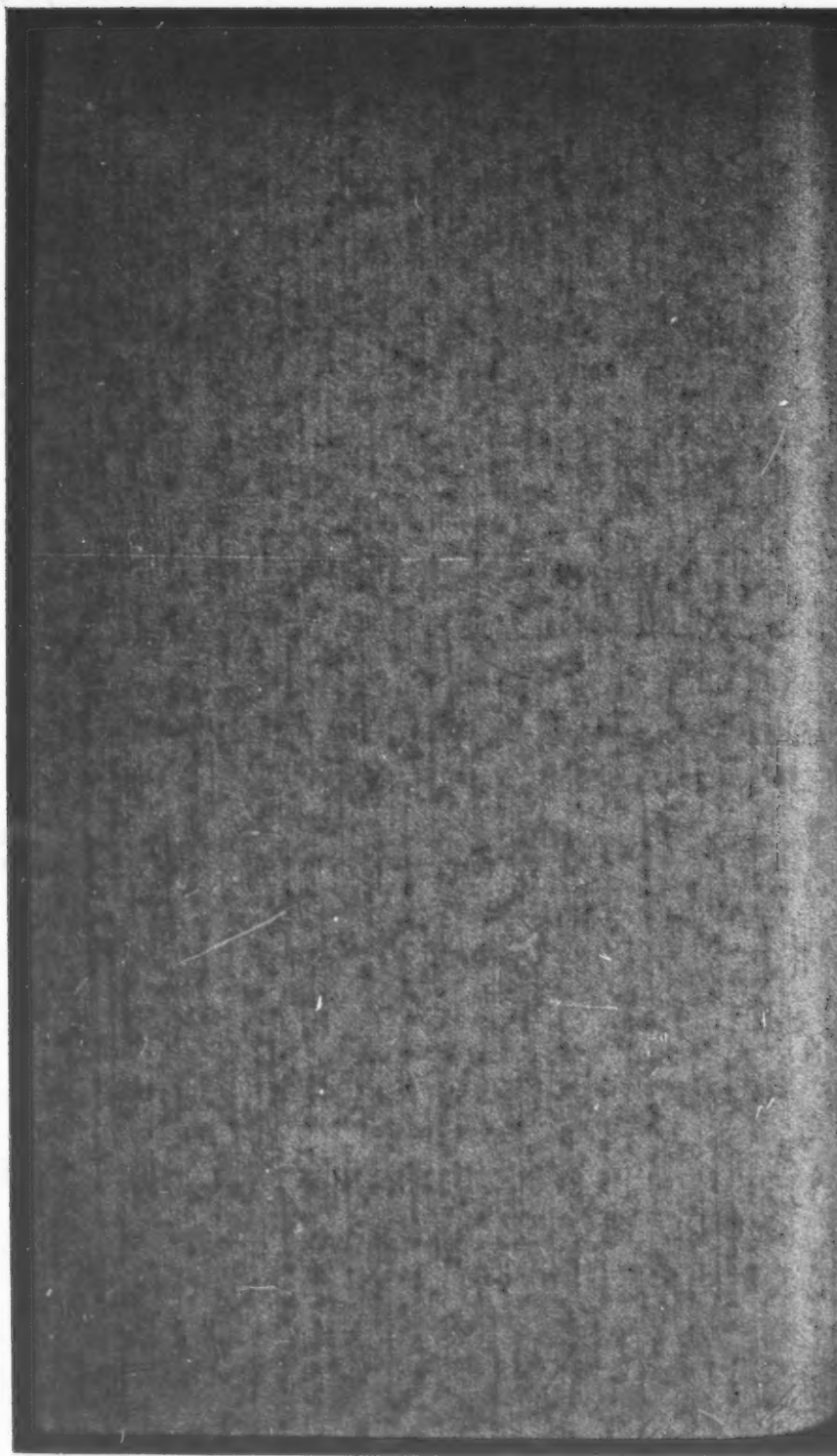
THE TITLE GUARANTY & SURETY
COMPANY

In Error to the United States Circuit Court of Appeals
For the Third Circuit.

BRIEF IN BEHALF OF PLAINTIFF
IN ERROR

WILLIAM JESSUP HAND

Attorney for Plaintiff in Error



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IN THE
Supreme Court of the United States
OCTOBER TERM, 1910
NO. 743

The People of Porto Rico
Plaintiff in Error
vs.

The Title Guaranty & Surety Company

*In Error to the United States Circuit Court of
Appeals for the Third Circuit.*

BRIEF IN BEHALF OF PLAINTIFF IN
ERROR.

I. STATEMENT OF THE CASE.

This is an action of assumpsit brought by The People of Porto Rico to recover the sum of One hundred thousand (\$100,000) dollars from The Title Guaranty & Surety Company, upon a joint and several bond, executed by the Vandegrift Construction Company as principal, and the defendant, and another surety company as sureties. The facts which give rise to the controversy will first be detailed.

On the 2nd day of March, 1903, the Executive Council of Porto Rico, acting under the legislative authority conferred by the "Foraker Act," granted a franchise to the Vandegrift Construction Company to construct an electric railway from San Juan to Ponce, a distance of about ninety miles, together with the right to develop electric energy by water or other power for distribution and sale for railway, lighting and industrial purposes. The ordinance was approved by the Governor, March 3, 1903, and by the President on March 21, 1903, (Record, page 17) and prescribed in detail the terms and conditions upon which the franchise was granted. Among the conditions were the following: That within one year from the date of acceptance of the ordinance, the grantee should cause the roadbed of the railway to be completely graded between the Island of San Juan and the urban portion of the Municipality of Caguas, and also cause the approaches and foundations of the proposed bridge across the body of water flowing through the Boqueron into the harbor of San Juan to be completed, and should have contracted for the material necessary for the superstructure of said bridge; and further, within said period should cause the power dam at Comerio Falls to be completed and have under contract the major part of the electrical apparatus necessary for the transformation of the power to be obtained therefrom into electric energy. It was also expressly provided that within two years certain parts of the railway should be fully completed and in readiness for service, and that within three years from the date of the accept-

ance of the ordinance the entire railway, as well as the power plant and transmission lines for operating the same, should be wholly completed. (Secs. 15-18. Record, page 24.)

The use of two valuable water powers, one at Comerio Falls on the Rio de la Plata, and the other at El Penon on the Rio de Loiza, the former being the most valuable water power on the island, was given to the grantee.

Section 30 provided that the franchise and all rights connected therewith might be assigned to the Porto Rico Railway, Light & Power Company, a corporation about to be organized for that purpose, but that no other assignment should be valid until approved by the Executive Council. It was further provided, that "the rights, privileges and concessions hereunder granted shall be subject to amendment, alteration or repeal by the Executive Council."

Sections 34 and 35 are so important in their relation to the issue in this controversy, that we quote them here in full, for convenience, viz:

"Section 34. The franchise, privileges, concessions and rights herein granted shall be accepted by the grantee in writing and by executing a bond in favor of The People of Porto Rico, in the sum of one hundred thousand dollars satisfactory in form to the Attorney-General and as to sufficiency to the Treasurer, and conditioned upon the full completion of the work herein authorized within three years after such acceptance **and in accordance with the conditions herein contained** and in ac-

cordance with the plans and specifications therefor approved as herein provided; and conditioned also upon the payment by the grantee to The People of Porto Rico of any loss or damage or costs accruing against The People of Porto Rico, by reason of the construction of the works herein authorized, at any time during the period of construction herein limited and before the completion thereof shall have been certified by the Commissioner of the Interior as in section thirty-five provided. Such written acceptance and bond shall be filed with the Executive Council within sixty days after this ordinance shall have been approved by the Governor of Porto Rico. Upon the approval and acceptance of said bond, the sum of ten thousand dollars now on deposit with the Treasurer of Porto Rico as a guaranty of the acceptance by the grantee of this ordinance shall be returned to the grantee."

"Section 35. Upon the presentation of a certificate from the Commissioner of the Interior showing the completion of the work herein authorized, **and upon the full compliance with the terms of this ordinance** to the satisfaction of the Executive Council, and upon the full payment by the grantee of any loss, damage and costs accruing against The People of Porto Rico as in said bond provided, the said bond shall be cancelled and returned to the grantee."

The ordinance was to take effect "immediately upon the acceptance by the grantee of the terms and conditions hereof, as above provided." (Sec. 38,

Record, p. 37.) The grantee filed its written acceptance on April 24, 1903, and on June 4, 1903, presented at San Juan, a bond with the two sureties stated above, for approval and acceptance. The bond was approved by the Attorney General, and by the Treasurer of Porto Rico, and the following endorsements were made thereon (Record, p. 50,) to wit.:

"San Juan, June 4, 1903.

The within bond of the Vandegrift Construction Company to the people of Porto Rico, dated May 23, 1903, is satisfactory in form to me.

Frank Feuille, Acting Attorney General."

"San Juan, June 4, 1903.

The within bond is satisfactory as to sufficiency to me.

Wm. F. Willoughby, Treasurer of Porto Rico."

On June 8, 1903, the Executive Council, upon recommendation of the Committee on Franchises, etc., adopted a resolution that the filing of the bond, approved by the Attorney General and Treasurer, be deemed a sufficient compliance with the requirements of the ordinance. (Record, page 126.)

The grantee commenced operations and shortly thereafter assigned all its rights to the Porto Rico Railway, Light & Power Company, who continued some work thereunder. Default was made by failing to comply with the terms and conditions of the ordinance requiring certain work to be done within one year, and, to prevent the forfeiture of the bond as well as the franchise, the grantee petitioned for an amendment of the ordinance extending the time

for such completion. An amending ordinance was thereupon passed by the Executive Council on July 7, 1904, duly approved by the Governor and the President, extending the time for the completion of the work provided to be done within one year, until January 1, 1905, upon certain conditions specified, (Record, page 51.) Having failed to complete the work prescribed on January 1, 1905, the grantee presented a petition for further extension and amendments, which were refused, and Executive Council, passed an ordinance, finally approved on May 12th, 1905, (Record, page 56), which, after reciting the failure of the grantee to comply with the terms of the ordinance relating to the completion of portions of the work, which were stated to be vital to the life of the grant, repealed the original ordinance and amendments, and declared all the rights, privileges and concessions appertaining or appurtenant to the grant, revoked and forfeited, as provided in Section 15, as amended, and under the general provisions of Section 30 of said ordinance. In Section 2 of said repealing ordinance there was, however, a reservation of the government's right to enforce the bond.

At the time of the repealing of the ordinance more than two years after the grantee had filed its acceptance thereof, scarcely two miles of the railway had been graded, between San Juan and Caguas, out of the entire 90 miles, this being all the work that was done on the ground so far as the actual building of the railway and power plants was concerned, and all active construction work had been absolutely abandoned. (Record, pp. 156, 158 and 216.)

The ordinance provided for—(a) a construction period of three years; (b) an operating period running ninety-six years thereafter.

The bond, as approved and accepted, (Record, page 39), recited the enactment of the ordinance granting the franchise, further stating that a copy of the ordinance was annexed thereto and was conditioned upon the full completion of the work within three years, *in accordance with the conditions contained in the ordinance*, and in accordance with the plans and specifications; also that within the said period the principal should build complete and have in operation the entire line of railway and power plant authorized, in accordance with the conditions contained in the ordinance; and also that the principal should duly perform within the said period of three years all others terms and conditions in said ordinance required to be performed by the principal within said period; and that the principal should pay any loss or damage accruing against the obligee by reason of the construction of the works authorized during the period of construction. The bond also provided that "no extension of the time or times limited in said ordinance for the completion **of the work therein authorized or any part thereof**, whether granted with or without the knowledge and consent of the sureties, shall in any way discharge the sureties from liability upon this bond."

An action was commenced by The People of Porto Rico in the United States Circuit Court for the Middle District of Pennsylvania against The

Title Guaranty & Surety Company, one of the sureties, (whose corporate name had been thus duly changed) jurisdiction being based upon the averment that The People of Porto Rico was "a body politic or corporation created by and organized under the laws of the United States of America, and deriving all its capacities and powers therefrom."

The plaintiff's statement, as amended, (Record, pages 10 and 71) demanded from the defendant the sum of one hundred thousand (\$100,000) dollars, with interest thereon (Record, page 102) as being due the plaintiff by reason of the default of the grantee and breach of the conditions of the bond set forth.

The defendant filed a demurrer to the plaintiff's statement, which was overruled by the Court, pleaded the general issue (Record, p. 91), and the case came on for trial. At the trial the plaintiff offered in evidence (Record, page 103 et seq.) the bond, the three ordinances, the written acceptance of the grantee; the certificate of assignment of the franchises to the Porto Rico Railway, Light & Power Company; the application of the latter for amendments to the ordinance; duly authenticated copies of the minutes of the proceedings of the Executive Council of Porto Rico relative to the acceptance of the bond and the adoption of the report of the Committee on Franchises recommending the repeal of the franchise because of the default of the grantee; also testimony showing default in compliance with the terms and conditions of the bond and ordinances as stated above, and evidence as to the acceptance of the terms of the amending ordin-

ance by the grantee. At the conclusion of the plaintiff's evidence, the counsel for defendants moved for a compulsory non-suit (Record, page 225) upon the ground that the plaintiff had shown no breach of the conditions of the bond; that the law of this country governed and determined the surety's liability; that the amount stipulated in the bond was a mere penalty to secure actual damages which had not been proved; and that the amendment and repeal of the original ordinance released the surety.

The counsel for the plaintiff contended that the contract of suretyship was to be governed by the laws of Porto Rico; that under the laws of Porto Rico and the terms of the original ordinance and bond, the amendment of the ordinance and its subsequent repeal reserving the right to enforce the bond, did not release the sureties; that the bond was an obligation with a penal clause under the Civil Code in force in Porto Rico, and that the entire amount with interest was recoverable, plaintiff having proved a breach of its terms. The trial judge while admitting that, under the law of Porto Rico, the enactment of the amending ordinance did not constitute a novation so as to release the defendant, and that in this respect the law of Porto Rico differed from the Common Law generally in force throughout the United States, nevertheless granted the motion for the non-suit (Record, page 235) upon the theory that the bond, so far as the defendant was concerned, was merely an obligation to pay money, and must be presumed to be payable, although not so specified, at its principal office in the State where it was incorporated, in this case

in Pennsylvania; that a contract between the parties existed immediately on the signing of the bond by the defendant, and before its delivery to and acceptance by plaintiff, and therefore the bond was a Pennsylvania contract and the obligation of the defendant was to be determined by the law of Pennsylvania; that under this law the amendment of the ordinance, as well as its subsequent repeal, had the effect of releasing the sureties. The trial judge having entered a compulsory non-suit, the counsel for the plaintiff moved for a rule to show cause why the non-suit should not be taken off. (Record, page 235.) The rule having been granted, and argument heard upon the motion, the court refused to take off the non-suit, and directed judgment to be entered in favor of the defendant with costs (Record, page 236), to which action the plaintiff excepted, and took a writ of error to the Circuit Court of Appeals for the Third Circuit, assigning as error, the refusal to take off the non-suit and the entry of judgment for the defendant, as well as the ruling of the trial judge in excluding certain offers of evidence. The Circuit Court of Appeals affirmed the judgment, basing its decision upon the theory that the bond was a Pennsylvania contract, and that the repeal of the franchise put an end to the undertaking of the principal and released the surety. The plaintiff thereupon took a writ of error to this court.

II.

SPECIFICATION OF ERRORS RELIED
UPON.

First. The United States Circuit Court of Appeals for the Third Circuit erred in entering judgment affirming the judgment of the Circuit Court of the United States for the Middle District of Pennsylvania, discharging the rule to show cause why the compulsory non-suit entered at the trial should not be taken off and giving judgment in favor of the defendant in error for costs, entered December 29th, 1909.

Second. The Circuit Court of Appeals erred in not reversing the said judgment of the said United States Circuit Court, and in not remanding said cause to the said Circuit Court for a new trial.

Third. The Circuit Court of Appeals erred in not sustaining the first assignment of error upon the record in said cause, the same being as follows, to wit:

First. The United States Circuit Court in and for the Middle District of Pennsylvania, erred in refusing to take off the compulsory non-suit entered by the Court, the order of the Court being as follows:

"Now, December 29, 1909, this cause coming on to be heard on rule to show cause why the compulsory non-suit entered at the trial should not be taken off and a new trial awarded, and having been argued by counsel for the respective parties, upon due con-

sideration thereof it is thereupon ordered and adjudged that the rule to show cause be and the same is hereby discharged, and judgment is directed to be entered in favor of the defendant for costs, to which refusal to take off said non-suit and the direction of judgment in favor of the defendant the plaintiff excepts.

(Signed) R. W. ARCHBALD,
District Judge."

III.

BRIEF OF ARGUMENT.

The court below having granted a compulsory non-suit, and directed judgment to be entered for the defendant for costs, which judgment was affirmed by the Circuit Court of Appeals, the principal question before this Court is, as stated in **Meehan vs. Valentine**, 145 U. S. 611, "whether the evidence introduced by the plaintiff would have been sufficient to sustain a verdict in its favor." We shall first recapitulate briefly the facts upon which plaintiff's claim is based:

In 1903, the Executive Council of Porto Rico, to whom sole power of legislation with regard to franchises in the Island of Porto Rico was entrusted by the Organic Act establishing a civil government for Porto Rico, passed a statute or ordinance, (Record, page 17), which was duly approved, granting a franchise to the Vandegrift Construction Company, its successors and assigns, to build and

operate an electric railway, and incidentally a power plant for generating and selling electricity in the Island of Porto Rico, the railway extending from the capital, San Juan, across the Island in a southwesterly direction, a distance of about 90 miles to the Playa of Ponce, on the southern coast. The ordinance provided that its terms and conditions should be accepted both by a written acceptance, executed by the grantee, and by the giving of a satisfactory and sufficient bond. The amount of the bond was specified in the ordinance, to wit, one hundred thousand (\$100,000) dollars, the conditions were specified, and further provisions (Section 35) relating to the manner of the discharge of its obligations were contained in the ordinance. It was specified that the bond must be satisfactory in form to the Attorney General of Porto Rico, and satisfactory as to its sufficiency to the Treasurer, and that it should be filed in the office of the Executive Council of Porto Rico for approval and acceptance. The bond (Record, p. 39) upon which this action was brought, signed by the Vandegrift Construction Co., as principal, and the defendant and another Surety Company as sureties, was tendered at San Juan, Porto Rico, for approval and acceptance. It was there approved as satisfactory, both by the Attorney General and Treasurer, and their endorsements to this effect were written upon the bond, and dated **"San Juan, June. 4, 1903."** (Record, page 50.) Four days later the bond was definitely accepted by action of the Executive Council as a substantial **compliance with the terms of the ordinance.** (Record, page 126.)

The ordinance expressly provided (Sec. 38, Record, page 37) that it should not take effect until its terms and conditions had been accepted by the grantee in the manner provided therein. The ordinance contained a provision (Sec. 30, Record, page 33) that the rights, privileges and concessions granted therein should be subject to amendment, alteration or repeal by the Executive Council, and stringent provisions (Sec. 15-18, Record, page 24) were included to insure the continuous progress of the work and its speedy completion. It is important to note that the ordinance provided for—

(a) A construction period of three years, dating from the acceptance of the grantee.

(b) An operating period continuing ninety-six years thereafter.

Among the terms and conditions relating to the construction period were the following:

Certain portions of the work were to be completed within one year, other portions within two years, and the entire railway and power plant were to be completed before the expiration of the three-year construction period. The grantee made default in the performance of the terms and conditions of the bond and the ordinance, relating to the work which was to be completed within one year, and applied for an amendment of the ordinance extending the time for such completion. (Record, page 177). An amending ordinance was thereupon passed by the Executive Council and duly approved, extending

the time upon certain conditions therein specified, and other minor amendments were made to the original ordinance. (Record, page 51). The amending ordinance provided that the extension was granted upon the express understanding, that upon a failure of the grantee to comply with the terms and conditions specified, the franchise should, at the option of the Executive Council, be subject to immediate forfeiture. The grantee and its assignee again failed to finish the work specified within the time as extended, and applied for further extension and amendments, which were refused, and the Executive Council passed an ordinance, duly approved, repealing the original ordinance and the amendments thereto and forfeiting the franchise. (Record, page 56). The repealing ordinance recited the default of the grantee and its assignee, and based the repeal on such default, by virtue of the general provisions of the original ordinance relating to the right to repeal, and the provision of the amending ordinance reiterating and emphasizing such right.

By the second section of the repealing ordinance, it was provided that all sureties or obligations given by the grantee as a guarantee of the faithful performance of the conditions of the ordinance should be forfeited to The People of Porto Rico, to all and whatsoever extent the same shall be liable under the law. Suit was thereupon brought against The Title Guaranty & Surety Company, one of the sureties upon the bond, which was a joint and several obligation, in the United States Circuit Court for the Middle District of Pennsylvania, the district

where the principal office of the defendant, a Pennsylvania corporation, was located.

I. WHAT LAW GOVERNS?

Proceeding, now, to the consideration of what we believe to be the fundamental error in entering the non-suit, we find, first, that the learned trial judge built up his theory of the case upon the assumption: (1) that the bond was a mere promise to pay money like a note; (2) that there was a binding contract with The People of Porto Rico as soon as the defendant had signed the bond; (3) that the money was only payable (although not so stated in the bond), at the defendant's principal office in Pennsylvania; and that, therefore, in view of these assumed facts, the contract was a Pennsylvania contract, to be governed by Pennsylvania law, a view which seems also to have been adopted by the Circuit Court of Appeals. (Record, pp. 228 and 258.) The difficulty with this, as it seems to us, is that the premises were wrong, and therefore the conclusion was necessarily wrong.

If a review of the facts relating to the giving of the bond in this case, and the principles of universal law applicable thereto, show anything, it would seem that the bond was beyond question a Porto Rico contract.

We believe that the following is a correct statement of the law applicable to the facts of this case, viz.:

THE LAW OF PORTO RICO GOVERNS, BECAUSE THIS WAS THE LAW WITH A VIEW TO WHICH THE CONTRACT WAS MADE BY ALL THE PARTIES, AND IN ADDITION TO THIS PORTO RICO WAS NOT ONLY THE PLACE WHERE THE CONTRACT WAS CELEBRATED, INASMUCH AS IT DID NOT TAKE EFFECT AS A BINDING OBLIGATION UNTIL ITS PRESENTATION, APPROVAL AND ACCEPTANCE THERE, BUT WAS ALSO THE PLACE WHERE IT WAS TO BE PERFORMED.

We shall first discuss the second branch of this proposition:

(a) *Porto Rico was the locus contractus.*

At the outset we suggest that the bond is not a mere note, governed by the law relating to negotiable instruments, but is a non-negotiable obligation, based upon a principal obligation, or contract, the payment of predetermined damages for whose non-performance it was given to secure. The contract and obligation of the surety is more like that of an endorser of a note, although different in some respects, and the analogy cannot be carried too far.

An apt illustration of similarity of liability is found in the case of a note endorsed in one State for the accommodation of the maker with the intention of being taken into another State and there negotiated by the latter. In such a case, although the endorsement was actually made in a different State, this does not determine the situs of the endorser's contract, but inasmuch as the latter author-

ized the maker to negotiate the note in another State, the contract of endorsement is held to have been made in the latter State, where the note took effect as a binding contract, and to be governed therefore, by its laws.

In Daniel on Negotiable Instruments, (2nd Ed.) Secs. 867 and 868, we find the principles in point stated as follows:

"The rule is of general acceptance, that the law of the place where the contract is made regulates the formalities of its execution and authentication, and the consideration necessary to its validity; and also regulates its interpretation, nature, obligation and effect. * * * * **The place where a contract is made depends not upon the place where it is written, signed or dated, but upon the place where it is delivered as consummating the bargain.** * * * Thus, the law of the place where a bill or note is written, signed or dated does not necessarily control it, but the law of the place where it is delivered from drawer or maker to payee, or from indorser to indorsee. * * * * A note dated and signed in blank in Virginia, and sent to Maryland, and there filled up and negotiated, is a Maryland and not a Virginia note. (Citing **Fant vs. Miller**, 17 Grat. 47). So where a note is endorsed for accommodation in one State, and deliv-

ered in another, the endorsement is governed by the laws of the latter, for the accommodation indorser makes that party to whom he lends his signature his agent for putting the instrument into circulation, and his own contract with those to whom it is negotiated must consequently be judged on the principles of agency which refer it to the place where the circulation commences. (Citing **Cook vs. Litchfield**, 5 Sand. 330; Wharton, Conflict of Laws, Sec. 459; 2 Parsons N. & B. 380.) And a bill accepted in New York for accommodation of a drawer in Massachusetts, and there put in circulation, would be governed by Massachusetts law. (Citing **First National Bk. vs. Morris**, 1 Hun. (N. Y.) 680)."

Applying these principles to the case at bar, we find that the defendant by signing the bond at the request of the Vandegrift Construction Company, made the latter its agent to present the bond for approval and acceptance at the seat of government of Porto Rico, and when it was finally adjudged to be satisfactory and accepted, then for the first time was there a binding contract with the obligee, and therefore Porto Rico was the **locus contractus**, and the laws of Porto Rico determine the liability of the obligors.

(b) *The contract of suretyship did not take effect until approved and accepted.*

In further answer to the ruling of the learned trial judge to the effect that the bond was a complete contract as soon as the defendant had signed the same, and before it was transmitted to, and approved and accepted as satisfactory in form and sufficiency by the officials designated, we submit the following considerations and authorities:

The original ordinance granting the franchise to the Vandegrift Construction Company provided in Sec. 38, (Record, page 37), that the ordinance should not take effect until the terms and conditions were accepted by the grantee "as above provided." The mode of acceptance is particularly pointed out in Sec. 34 of the ordinance, by which it is provided that "the franchise, privileges, concessions and rights herein granted, shall be accepted by the grantee in writing and by executing a bond, * * * satisfactory in form to the Attorney General, and as to sufficiency to the Treasurer." It will thus be noted that **the ordinance did not take effect** (and necessarily, therefore, the bond could not take effect) until the bond had been submitted, and adjudged to be satisfactory, in form and in sufficiency, by the officials designated. It was also clearly stipulated that there could be no acceptance of the bond until after such approval, for in the last sentence of Sec. 34, it is stated that **"upon approval and acceptance of said bond"** the deposit of \$10,000 was to be refunded to the grantee. (Record, page 36.) The Court will take judicial notice of the fact that San Juan is the capital and seat of government of Porto Rico; that the offices of the officials

named are at San Juan, and that the office of the Executive Council, where it is provided that the bond was to be presented and filed for approval and acceptance, was at San Juan. But the fact as to where it was presented for approval and acceptance does not need to rest upon judicial notice, for the endorsements upon the bond itself show that it was presented for approval and acceptance at San Juan, and there endorsed as satisfactory in form and sufficiency. (Record, page 50). Only a bond which should, upon investigation and examination, be found to be satisfactory in form and sufficiency, could meet the requirements of the ordinance, and therefore there was no fulfillment of these requirements, so as to constitute the bond a valid and binding instrument, until it had been adjudged to be satisfactory and sufficient and accepted. Therefore, the bond, after execution by the obligors, and when presented at San Juan, was a mere proposal on the part of the principal and its sureties, which did not take effect until its approval and acceptance.

This principle is enunciated in the case of **U. S. vs. Le Baron**, 19 How. 73, which was an action upon the bond of a postmaster, to recover the penalty alleged to be forfeited by reason of his defalcation. The Court held that, inasmuch as the law required postmasters to give bond with approved security on their appointment, the bond tendered must be accepted by the Postmaster General as sufficient in point of amount and security, **before it can have any effect as a contract.** This Court said:

"Our opinion is, therefore, that this bond speaks only from the time when it reached the Postmaster-General and was accepted by him; that until that time it was **only an offer, or proposal of an obligation, which became complete and effectual by acceptance**; and that, unlike the case of a collector's bond, which is not a condition precedent to his taking office, and which may be intended to have a retrospective operation, the bond of a postmaster, given on his appointment, cannot be intended to relate back to any earlier date than the time of its acceptance, because it is only after its acceptance that there can be any such holding of the office, as the bond was meant to apply to."

This case is cited and followed, upon the same principle, in **Moses vs. United States**, 166 U. S. 578.

As authority for the rule that where delivery (or acceptance) is necessary to make a contract binding and effectual, the place of delivery (in this case San Juan, Porto Rico), and not the place of formal execution of the contract, is the place of contract, we refer to the cases of:

Bell vs. Packard, 69 Me. 105, (31 Amer. Rep. 251.)

Gay vs. Rainey, 89 Ill. 221, (31 Amer. Rep. 76.)

Baum vs. Birchall, 150 Pa. St. 164.

Butler vs. Meyer, 17 Ind. 77.

Hill vs. Chase, 143 Mass. 129.

Stanford vs. Pruet, 27 Ga. 243, (73 Amer. Decis. 734.)

The same principle is announced in **Brandt on Suretyship and Guaranty** (3rd Ed.), Vol. 1, Sec. 34, where it is said:

"In order to bind a surety or guarantor, his contract must be delivered, and it takes effect from the time of delivery. * * *

An official bond in order to bind a surety thereon, must, like any other contract, be delivered or accepted before it becomes operative; and it is held that there can be no delivery of such a bond until it is approved by the proper authority." (Citing the cases of **Franklin Bank vs. Cooper**, 36 Me. 179; **Chamberlain vs. Hopps**, 8 Vt. 94; **Commonwealth vs. Kendig**, 2 Pa. St. 448; **People vs. Van Ness**, 79 Cal. 84; **City of Evansville vs. Morris, et al.**, 87 Ind. 269.)

As further evidence of the universality of the recognition of this principle of law, we cite the case of **Brockway vs. Petted**, 79 Mich. 620, in which it was held that the liability of sureties upon a statutory bond requiring approval and filing, does not attach until it is accepted and approved by the authorities designated. Also the case of **Bruce vs. State**, 11 Gill & J. 382, a suit upon a sheriff's

bond in Maryland, whose constitution provided that the sheriff should not be qualified to act until he had given a bond, and the statute provided before whom and when, such bond should be taken, in which the Court say:

"The bond is made, it is the obligatory act of the signers, when, being signed, it is presented to the court or judge, etc., and the sureties are adjudged sufficient. * * * *

From that moment it is the operative act and deed of the parties and not before."

To the same effect are the cases of **Board of County Comrs. vs. American Loan & Tr. Co.** 67 Minn. 112, 114, and **Comer vs. Baldwin** 16 Minn. 151 Cited in **Am. & E. Encyc. Law** (2d Ed.) Vol. 4, page 622, paragraph 2; also the cases of **Hyatt vs. Grover & Baker S. M. Co.**, 41 Mich., 225, and **Grand Rapids vs. U. S. Fidel. & G. Co.**, 128 Mich. 106.

It will be noted that this is not the case of an application from The People of Porto Rico to the defendant for a surety or indemnity bond, accepted, and the contract issued, by the company at its home office and delivered there. The ordinance required the grantee to submit a bond at the seat of government, which must be satisfactory to certain designated officials of Porto Rico, both as to the form of the instrument, and the sufficiency of the sureties, before it would be accepted. No particular sureties were designated, and until the bond was presented for the determination of the essen-

tial prerequisite facts specified, the bond was not even a proposal. Upon being presented at San Juan, as required, it was still merely a proposal, requiring approval and acceptance before there could be a binding contract between the parties. The ordinance simply stated the terms and conditions upon which, if a proper instrument and proper parties were presented, the determination of which was delegated to certain of its Executive officers, The People of Porto Rico would be willing to enter into a contract. Under the reasoning of the learned judge, if the grantee had prepared an instrument, not in accordance with the terms of the ordinance, and with worthless or minor sureties, there would have been a complete contract with the obligee as soon as the instrument was signed by the sureties. This is the **reductio ad absurdum** of the theory that there was a binding contract before approval and acceptance. It is true there might have been a contract between the grantee and the defendant upon consideration of the payment of the premium to the latter by the former, whereby the defendant bound itself to become surety for the grantee, if the bond was accepted by the obligee, but **this contract between the grantee and defendant was wholly apart from, and outside of the bond itself as a contract between the obligee and the obligors.** The failure to give effect to this distinction, we believe, accounts for the error in the reasoning of the learned trial judge, apparently approved by the Circuit Court of Appeals.

There would seem, then, to be no room for argu-

ment as to when and where the bond in the case at bar took effect, and became a binding contract between the obligors and the obligee. From the bare fact, devoid of the other circumstances mentioned above, that the bond was required to be presented for approval and be accepted at the seat of government before the principal contract upon which it was based took effect, it must, under universally recognized principles of law, be deemed to have become a complete contract, only after being filed, approved and accepted at San Juan. Otherwise we would have the anomalous situation of a contract of suretyship guaranting the performance of a principal contract not yet in existence. The mere fact that one of the parties, the defendant, was a corporation whose domicile was in another country, could not in anywise affect the matter.

(c) *The bond having been delivered in Porto Rico, approved and accepted there, and no other place of payment being specified, was payable in Porto Rico.*

Upon this point it seems hardly necessary to cite any authorities. The principle is clearly recognized and well stated in **Daniel on Negotiable Instruments**, (2nd Ed.) Sec. 881, where it is said:

"It has been held in Massachusetts, that if a bill or note be payable generally, and be negotiated by one holder to another in a foreign country, it becomes a promise to

pay such holder, and is consequently a contract of the place of such negotiation to the holder and is governed by its laws. But although a debt payable generally is payable anywhere, and, if negotiable, is payable to anybody to whom it may be transferred, nevertheless, **a contract to pay generally is governed by the law of the place where it is made**, for the debt is payable there as well as in every other place. Being payable everywhere cannot render it subject to the laws of every place. **The parties must have had in view the law of some place, and that is presumed to be the place where their contract is made."**

It makes not a particle of difference in the principles applicable, that the surety was a corporation. We know of no authority which holds that a corporation is, in this respect, any different from individuals, or that its contracts are performable only at its principal place of business. Furthermore, it affirmatively appears from the evidence that the defendant was authorized to act "as security for the faithful performance of any contract entered into with any person or municipal or other corporation or with any State or government, by any person or persons, corporation or corporations." (Record, page 143). It thus had full power to make contracts performable anywhere.

In Kent's Commentaries (Text Book Series), Part IV., Vol. II, page *285, note, it is said:

"It may now be considered as a settled principle of law that a corporation of one state or country may not only sue, but may make valid contracts in another, provided their charter warrants such contracts, and there be no positive disability by statute for a corporation to make such contracts in the state where they are made. As a general rule personal rights and contracts have no locality, and the laws of comity apply in their fullest extent between the several States of the Union. This whole doctrine was definitely established in the Supreme Court of the United States in the case of **Bank of Augusta vs. Earle**, 13 Peters, 519, where it was held in a clear and able opinion delivered by the Ch. J., that the purchase by a competent agent, in Alabama, of a bill of exchange, by an incorporated bank of another State, was a valid contract."

The principle is thus stated in **Brandt on Suretyship**, (3rd Ed.), Vol. 1, Sec. 13, page 36:

"It goes without saying that a corporation organized for the express purpose of entering into contracts of suretyship may make valid contracts of suretyship and guaranty anywhere."

Applying these principles to the liability of the defendant upon the bond in question, we find that the contract was made in Porto Rico, with the gov-

ernment of Porto Rico, that not only was there no other place of performance specified, but, on the contrary, the terms of the instrument itself showed that it had relation to a contract wholly to be performed in Porto Rico, was given in pursuance of the provisions of a statute of Porto Rico, specifying its terms and conditions, and was consequently performable where it was made, at the seat of government.

A still further important consideration arises out of the fact that the contract of the sureties was entered into and consummated by one and the same instrument, at one and the same time, and at one and the same place, as that of the principal. Now, it was not, and could not be seriously urged that the principal's contract with the government was performable anywhere but in Porto Rico, and necessarily had relation to its laws, hence by irresistible inference and presumption the contract of the sureties was performable there, and the law of Porto Rico must govern the contract.

(d) *Even though the bond had provided, for convenience, that the sum named should be payable in New York, or some other place outside of Porto Rico, this fact would not be the controlling circumstance in determining the liability of the obligor.*

This is believed to be a correct statement of the law, and demonstrates the error of the learned trial judge not only in basing his decision upon a fact which did not appear in the case, but which, if it did appear, would in no sense be a controlling circumstance in determining the place and law of the con-

tract. The determining circumstance is, ordinarily, where was the contract consummated, and where did it take effect.

In Liverpool & Great Western Steam Co. vs. Phoenix Insurance Co., 129 U. S. 397, this Court held that the nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it, had some other law in view. In support of this proposition this Court cited the case of **Lloyd vs. Guibert** 6 B. & S. 100; s. c., L. R. 1 Q. B., 115, in which Mr. Justice Willes said:

"It is generally agreed that the law of the place where the contract is made is prima facie, that which the parties intended or ought to be presumed to have adopted as the footing upon which they dealt and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as for instance, that the contract is to be entirely performed elsewhere or that the subject matter is immovable property situate in another country and so forth; which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general one, by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made; which intention is

inferred from the subject matter and from the surrounding circumstances so far as they are relevant to construe and determine the character of the contract."

The cases of **Cox vs. U. S.**, 6 Pet. 172, **Pritchard vs. Norton**, 106 U. S. 124, and **Lamar vs. Micou**, 114 U. S. 218, were also cited as authority for "the general rule that contracts are to be governed as to their nature, their validity and their interpretation by the law of the place where they were made unless the contracting parties clearly appear to have had some other law in view."

In the case of **Mutual Life Insurance Company vs. Cohen**, 179 U. S. 262, the principle is laid down that the presumption is that the law of the place at which the contract is made shall govern the rights of the parties in the absence of anything to show the contrary. In this case, although the application for the policy, signed in Montana, provided that it was to be subject to the charter of the Company, and the laws of New York, it was held, nevertheless, that the contract having been made in Montana, was not subject to the requirement of New York laws relating to forfeiture for non-payment of premium, upon the ground that the application was only a preliminary instrument, and the policy issued thereon was not controlled by such a provision in the application. The court said: "**The presumption is in favor of the law of the place of contract. He who asserts the contrary has the burden of proof.**"

It may be noted that in this latter case the policy contained a stipulation that it should not be binding unless the first premium had been paid and the policy delivered. The premium was paid and the policy delivered in the State of Montana, and it is said "Under these circumstances, under the general rule, the contract was a Montana contract and governed by the laws of that State." The facts showed that the amount of the policy was payable in New York, and yet the Court decided that the *lex loci contractus* governed in the interpretation of the contract.

Had the Surety Company in the case at bar intended that its liability should only be governed by the law of the State where its principal office was located, it might have protected itself, by having a provision inserted in the bond that the contract should be considered as having been made and executed in the State of Pennsylvania, and be construed only according to the laws of that State. Such a stipulation was upheld in *Baxter vs. Brooklyn Life Insurance Co.*, 119 N. Y. 450-454, (7, L. R. A. 293) cited in *Mutual Life Insurance Company vs. Cohen*, 179 U. S. 262. In this latter case citations are given of cases holding that foreign insurance companies, making a contract in another State or country, are bound, in the interpretation of the contract, by the laws of the country where the contract was consummated and went into force, and not where it was signed, nor where the principal office of the company was located. And yet the learned trial judge held that the bond is similar to a policy of insurance, in so far as the principles determining the seat of the obligation are concerned.

For further authority upon the proposition that in cases arising under insurance policies, the fact that the policy expressly provides that the amount shall be payable at the home office of the company is not the controlling factor in determining what law governs the contract, and that this is the law universally recognized in this country, we refer to—

Life Assur Soc. vs. Clements. 140 U. S. 226.

Todd vs. Ins. Co. 11 Phila. 355.

Watt vs. Gldeon, 8 Dist. Rep. (Pa.) 395.

May on Insurance, Sec. 66.

(e) *The fact that the plaintiff was compelled, in order to enforce payment of the bond, to bring suit in Pennsylvania, the "home" of defendant, has absolutely no bearing upon determining what law governs the contract.*

We know of no authority for the proposition of the learned judge, that because suit was brought in Pennsylvania, in order to obtain jurisdiction over the defendant, this was a circumstance determining the seat of the contract. If true, it would logically lead to the proposition that the *lex fori* should in all cases govern in determining the nature, interpretation and effect of contracts. A reference to one or two cases will show the fallacy of the proposition:

In Cox and Dick vs. United States, 6 Pet. 172, although the bond was signed in Louisiana, the sureties resided there, and suit had to be brought in Louisiana in order to obtain jurisdiction of the de-

pendants, yet this latter fact was not considered as having any bearing whatever upon the question of the law governing the contract. The same state of facts was presented in **Duncan's Heirs vs. United States**, 7 Pet. 435, and the same conclusion reached.

Under the Act of Congress and the ruling in **Re Keasby & Mattison Co.**, 160 U. S. 221, the only place where the defendant in the case at bar could be sued in the Federal Courts was in the district of which it was an inhabitant, and that this principle applies to sureties on the bond of a public contractor is shown by the case of **Davidson Bros. Marble Co. vs. U. S. ex rel. Gibson**, 213 U. S. 10.

It is stated in **Wharton on Evidence** (2nd Ed.) Vol. 1, Sec. 301, that "where the seat of an obligation is in another State (e. g. in a State where prevails the Roman common law, as distinguished from the English common law, or the converse) the **judex fori** will be bound to accept such foreign law if proved." In the case at bar, however, the Federal Courts will take judicial notice of the law of Porto Rico, just as they will of Acts of Congress and the laws of the several States and Territories.

Since Porto Rico is territory belonging to the United States and subject to its authority, its laws are not the laws of a foreign country, but stand on the same plane so far as judicial notice by the Federal Courts are concerned, as the laws of the different States or of the United States, particularly as it is specifically prescribed by Act of Congress (the **Foraker Act**) what laws shall be in force in Porto Rico.

The point has furthermore been expressly ruled upon by the Supreme Court in the case of **Ponce vs. Roman Catholic Ap. Church**, 210 U. S. 296, 309, where it is said:

"The Court will take judicial notice of the Spanish law as far as it affects our insular possessions. It is *pro tanto* no longer foreign law."

We believe these authorities are sufficient to answer, in the negative, the question whether the mere fact that suit is brought upon the contract and it is sought to be enforced in the State where the surety resides, has any bearing upon the determination of what law governs the contract.

(f) *The law with a view to which the contract was made governs.*

Proceeding now to the consideration of the first branch of the proposition, stated above, which we believe shows conclusively that the bond, upon which suit was brought, was a Porto Rico contract, and governed by Porto Rico law, we submit the following:

The contract of suretyship was necessarily made with a view to the law of Porto Rico, and therefore the contract is governed as to its nature, validity, interpretation and effect, by the law of Porto Rico.

It is a principle of universal law with relation to the interpretation and validity of contracts, that the contract is governed by the law with a view to which it was made.

In the case at bar we find the following facts:

1. The Executive Council of Porto Rico provided by statute for the very bond in question, specifying its terms, conditions and the measure of its obligations.

2. The contract of suretyship was made with the government of Porto Rico, and was based upon a principal contract wholly to be performed in Porto Rico, and which admittedly is a Porto Rico contract.

3. The bond, by its express provisions, has incorporated in it the very statute of Porto Rico providing for its inception and consummation, reciting that a copy of the ordinance is attached to it.

4. The bond itself, when filed at San Juan, approved and accepted in the manner designated, was expressly declared to constitute an acceptance of the terms and conditions of the ordinance, and the ordinance did not take effect until the approval and acceptance of the bond.

5. The bond was delivered, approved and accepted at San Juan, the seat of government of Porto Rico.

Applying the general principles of the law relating to contracts to these facts, we deduce the following propositions:

(a) The contract of suretyship was made in Porto Rico, for it was celebrated there, and only took effect and became a binding contract upon its delivery, approval and acceptance there.

(b) The principal's contract being a Porto Rico contract, wholly performable there, and no other place of performance (payment) having been specified in the bond, Porto Rico must necessarily be the locus solutionis.

(c) The terms and conditions of the bond having been expressly prescribed by enactment of a legislative body of Porto Rico i. e. by a law of Porto Rico, the bond cannot be held to be interpretable, or governed, by any law other than that of Porto Rico.

(d) The Executive Council having provided by its enactment the terms of the contract of suretyship, and provided for its delivery and acceptance at the seat of government of Porto Rico, it surely could not by any process of reasoning, be held to have had any other law in view as the law of the contract than that of Porto Rico, and the surety by presenting its obligation, based upon and drawn in accordance with the terms of the enactment of the Executive Council, for approval and acceptance at the seat of government, must necessarily have made the contract with a view to the Porto Rico law.

(e) The contract having thus been made by all parties with a view to the Porto Rico law, must, in accordance with the principles of universal law, be governed in every forum by the law of Porto Rico.

Form of the Bond.

It must be remembered that the bond was the creature of a statute of Porto Rico, and that the subject of the legislation was a public utility franchise in Porto Rico; that there is the strongest possible presumption against the inference, from the mere form in which the instrument provided for is drawn, that the legislative body intended that an instrument specified to be given in a law of its own enactment, relating wholly to a purely local franchise, should be construed or governed by the law of another country, whose law differs from its own; particularly when there is no difficulty in construing the instrument according to the law of the land. To hold the contrary would be an unwarranted affront to the government and inhabitants of Porto Rico.

Can it be said the Porto Rico legislature proposed to repeal its own laws in providing for an instrument which was recognized by its own jurisprudence and interpretable according to its own laws? Is mere form to overrule all the most overwhelming presumptions of law, and all the principles relating to the determination of what law governs a contract, arising out of the subject of the contract, the parties to the contract, the law which gave birth to the contract, and the place of its consummation, delivery and performance? To state these questions merely, is to answer them in the negative.

It is the ordinance that prescribes the instrument in question, its terms and the measure of its obligations, and the ordinance is the act of a legislative

body of Porto Rico. The mere form in which the instrument so prescribed is drawn, cannot affect the plain intent of the legislature. It must be noted that it is the intention of the Executive Council that is the criterion in the case at bar, for their expressed intention was unquestionably adopted by the grantee and its sureties by presenting a bond drawn in accordance with the terms of the ordinance, and the bond was accepted by the Executive Council as a substantial compliance with the terms of the franchise and ordinance. (Record, page 127.)

The bond is not an instrument unknown to civil law countries and is interpretable and construable under civil law principles, and therefore a mere matter of form, solely and exclusively, cannot be allowed to override the clear principles as to what law is presumed to govern a contract.

It must be noted that bonds similar to the one at bar were, originally, in England, classed as absolute penal obligations, and the entire sum named was recoverable for a breach. The common law interpretation was an outgrowth of the application of equitable principles of relief where the amount stipulated was unconscionably large.

The one thing that seems clear from a careful reading of Sections 15, 16, 17, 18, 34 and 35 of the ordinance, is that for a failure to build the road in accordance with the conditions agreed upon, the grantee was to pay the sum of \$100,000 as pre-determined or liquidated damages, and it presents all the elements of an obligation with a penal clause under the Porto Rican law.

Inasmuch as the Executive Council desired to secure the payment of the \$100,000, in the event of a breach of the conditions specified, a bond was naturally the instrument provided for.

The presumption that the bond is to be construed by the law of Porto Rico is irresistible, inasmuch as it is the creature of a statute of Porto Rico.

The ruling was made in **Clark vs. Barnard** 108 U. S. 436, that even under the laws of this country the mere form of an obligation did not raise an inference as a rule of law or a conclusive presumption that the sum named in a bond was intended as a mere penalty to secure the performance of the conditions, to be discharged on payment of damages arising from non-performance.

If reference is had to the case of **Pritchard vs. Norton**, 106 U. S. 124, it will be found that the bond, upon which suit was brought, was in the same form as that of the bond in the case at bar, and furthermore it was drawn up, dated, signed and delivered in New York, a State where the common law prevailed, but this Court gave absolutely no weight to the mere form of words used in the instrument, but held the liability created thereby was to be determined according to the law of Louisiana, under the principles of the civil law, because that was the law with a view to which it was given and which the parties must necessarily have had in contemplation as governing their contract. The contrary theory of the learned trial judge and of the Circuit Court of Appeals disregards

the judgment of this Court upon a similar instrument, where the facts showing the intention of the parties were not nearly so strong, (for there the obligee was not a government but a private individual, and the bond was dated, executed and delivered in a State where common law rules prevailed), and permits a mere matter of form to override all the weighty and substantial principles of universal law.

In this connection we call attention to the fact that The People of Porto Rico constitute a sovereignty in actual administration with full powers of legislation over matters of a local nature, subject only to the limitations prescribed in the Organic Act, is shown by the decision in the case of **Kawanakoa vs. Polyblank**, 205 U. S. 349.

The Civil Code of Porto Rico recognizes the same principle as will be seen from the following provision:

"Sec. 1245. Contracts shall be binding *whatever may be the form* in which they may have been executed, provided the essential conditions required for their validity exist."

The case of **Cox and Dick vs. United States**, 6 Pet. 172, is directly in point and rules the case at bar on this question. The facts showed that a bond was given by a Navy Agent at New Orleans, signed by the agent as principal, and Cox and Dick, residents of New Orleans, as sureties. After execution by the obligors, the bond was approved in New Orleans by the U. S. District Attorney for the

Louisiana District. Suit was brought in the United States District Court for the Eastern District of Louisiana, against the sureties, to recover on the bond for a breach of its terms by the principal. Mr. Justice Thompson, in delivering the opinion of the Court, after stating that while there was no evidence showing the place of execution of the bond, it was most likely in point of fact, for the convenience of the parties, executed at New Orleans, particularly as the United States District Attorney approved it there, said:

"But admitting the bond to have been signed at New Orleans, it is very clear that the obligation imposed upon the parties thereby looked for its execution to the City of Washington. It is immaterial where the services as navy agent were to be performed by Hawkins. His accountability for non-performance was to be at the seat of government. He was bound to account, and the sureties undertook that he should account for all public moneys received by him with such officers of the government of the United States as are duly authorized to settle and adjust his accounts. **The bond is given with reference to the laws of the United States** on that subject. And such accounting is required to be with the Treasury Department at the seat of government; and the navy agent is bound by the very terms of the bond to pay over such sum as

may be found due to the United States on such settlement; and such paying over must be to the Treasury Department, or in such manner as shall be directed by the Secretary. The bond is, therefore, in every point of view in which it can be considered, a contract to be executed at the City of Washington, and the liability of the parties must be governed by the rules of the common law."

Similar facts were presented in the case of **Duncan's Heirs vs. United States**, 7 Pet. 435-449. This was a suit brought in United States District Court for the Eastern District of Louisiana, upon a paymaster's bond, given to insure the faithful performance of the duties of his office at New Orleans. It was signed by the postmaster and one surety and acknowledged by them at New Orleans, and by the other surety signed and acknowledged in Pennsylvania. The court said:

"A question was raised and elaborately argued by the counsel for the plaintiffs, whether this bond, having been executed at New Orleans, was not governed, not only as to the manner of its execution, but also to the extent of the obligations incurred under it, by the principles of the civil law. In the case of **Cox et al. vs. The United States**, decided at the last term, this question was settled. This is an official bond, and was

given in pursuance of a law of the United States. By this law the conditions of the bond were fixed and also the manner in which its obligations should be enforced. It was delivered to the Treasury Department at Washington, and to the Treasury did the paymaster and his sureties become bound to pay any moneys in his hands. These powers exercised by the federal government, cannot be questioned. It has the power of prescribing under its own laws, what kind of security shall be given by its agents for a faithful discharge of their public duties. And in such cases the local law cannot affect the contract, as it is made with the government, and in contemplation of law, at the place where its principal powers are exercised."

Another leading case in support of this principle, and which rules the case at bar, is that of *Pritchard vs. Norton*, 106 U. S. 124. This was an action brought upon a bond of indemnity, although in form similar to the bond in the case at bar. The bond was executed by the obligors and delivered to the obligee in the State of New York, and was given to indemnify the obligee against loss or damage arising from his liability as surety on an appeal bond in proceedings in the Louisiana courts. Suit was brought by the obligee's executrix in the United States Circuit Court for the District of Louisiana. As was stated

in the opinion of the Supreme Court, the single question presented by the record was, whether the law of New York or that of Louisiana defined and fixed the rights and obligations of the parties. The Court held the deciding consideration, was **what law the parties had in view in making the contract**, and after a review of the authorities relating to the law of contracts, decided, that inasmuch as the obligee's undertaking, against which the bond was given to indemnify him, was performable in the State of Louisiana and in accordance with its laws, the obligors were bound to fulfill their obligation in Louisiana; and in concluding the opinion say:

"We do not hesitate therefore, to decide that the bond of indemnity sued upon was entered into with a view of the law of Louisiana as the place for the fulfillment of its obligation; and that the question of its validity, as depending on the character and sufficiency of the consideration should be determined by the law of Louisiana and not that of New York."

The ruling in the case of **Pritchard vs. Norton** was summarized by Mr. Justice Gray in the case of **Lamar vs. Micou**, 114 U. S. 218, in which he says:

"In **Pritchard vs. Norton**, 106 U. S. 124, the point decided was that the validity and effect of a bond, executed in New York, to indemnify the obligee therein against his liability upon an appeal bond, executed by

him in a suit in Louisiana, was to be governed by the law of Louisiana. The decision was based upon the fundamental rule, or in the words of Chief Justice Marshall, the 'principle of universal law' * * * 'that in every forum a contract is governed by the law with a view to which it was made.' *Wayman vs. Southard*, 10 Wheat 1, 48. And reference was made to two English cases of high authority in which by force of that rule, the effect of a contract of affreightment, and of a bottomry bond given by the master, was held to be governed, not by the law of the place where the contract was made, nor by that of the place where it was to be performed, nor yet by the law of the place in which the suit was brought, but by the law of the country to which the ship belonged. *Lloyd vs. Guibert*, 6 B. & S. 100; *S. C. L. R.* 1 Q. B. 115; the *Gaetano & Maria* 7 P. Div. 137."

The same principle of universal law is enunciated in a Pennsylvania case, *Irvine vs. Barret*, 2 Grant's Cases 73, cited and approved in *Pritchard vs. Norton*, *supra*, where it is said:

"Where a contract is made with the government it is, in contemplation of law, made at the place where its principal powers are to be exercised. 7 Pet. 449; 6 Ib. 172. And where security

is given in pursuance of a decree of a court of justice, it is to be construed according to the intention of the tribunal which directed its execution, and is in contemplation of law made and to be performed at the place where the court exercises its jurisdiction. * * * The bond given in this State, being but a collateral security for the former, is to be governed by the law which controls the principal indebtedness."

Applying the rule of law here enunciated to the facts of the case at bar, we find that inasmuch as the defendant's contract of suretyship was made with the government of Porto Rico, in pursuance of a law of Porto Rico, at the seat of government, and that the principal's obligation was performable in Porto Rico, the law of Porto Rico must under all the well-recognized principles of universal law govern the contract.

Since therefore the *lex loci contractus*, the *lex celebrationis*, the *lex solutionis*, and the law with a view to which the contract was made, all point to the same conclusion, and the contract was not only consummated in Porto Rico, and performable there, but was made with a view to the law of Porto Rico, which prescribed its terms and conditions, the case would seem to be entirely free from doubt. The law of Porto Rico must necessarily govern, and be enforced in every forum, in determining the nature and extent of the obligations of the contract of suretyship in question.

* * * * *

II.

UNDER THE LAW OF PORTO RICO THE EVIDENCE WAS SUFFICIENT TO SUSTAIN A VERDICT FOR THE PLAINTIFF.

Coming now to the main proposition, namely, that under the facts proved, the plaintiff was entitled to recover and the surety was not released by the assignment, amendment or repeal of the franchise, we call attention to the fact that the learned trial judge held that there was no discharge of the surety under the law of Porto Rico, (Record, page 155, bottom), but based his ruling in entering the non-suit solely upon the assumption that the law of Pennsylvania applied, (Record, page 233), and that under this law the surety was released by the amendment of the original ordinance, and the subsequent repeal of the franchise.

In considering the law of Porto Rico bearing upon the question of the liability of the defendant upon the bond in question, under the proved facts of the case, we shall discuss the question under the following general heads:

A. What was the nature of the obligation, and what sum was recoverable for its breach under the law of Porto Rico?

B. Did the plaintiff prove a breach of the conditions of the obligation?

C. Was the defendant released by the assignment or amendment of the original ordinance?

D. Was the defendant released by the repeal of the franchise?

At the outset, it may be noted that at the time of the cession of the Island of Porto Rico by Spain to the United States, the Spanish Civil Code, promulgated by Royal Decree on July 31, 1889, was in force in Porto Rico, and is still the basis of the civil law of the island. This Code was enacted in conformity with the provisions of the law of May 11, 1888, and was approved by Royal Decree on July 24, 1889. As was said in **Royal Insurance Co. vs. Miller**, 199 U. S. 367, prior to that time the law in force was that found in the code known as *Novisima Recopilacion*.

In his message transmitted to Congress, December 5, 1899, recommending legislation with reference to the government of Porto Rico, President McKinley said: "The system of civil jurisprudence now adopted by the people of this island is described by competent lawyers, who are familiar with it, as thoroughly modern and scientific, so far as it relates to matters of internal business, trade, production and social and private right in general."

This is referred to and commented upon in **Perez vs. Fernandez**, 202 U. S. 80, 91, where the Court say: "Cases which have come to this Court from the Philippines and Porto Rico, where we have had occasion to consider the enactments making changes in the laws of those islands, show the disposition of the Executive and Congress not to interfere more than is necessary with local institutions,

and to engraft upon the old and different system of jurisprudence, established by the civil law, only such changes as were deemed necessary in the interest of the people, and in order to more effectually conserve and protect their rights.

* * * * This policy has been followed in dealing with the Porto Ricans."

In the so-called Foraker Act, approved April 12, 1900, the Organic Act for Porto Rico, Congress provided in Section 8: (31 Stat. at L. 77, chap. 191.)

"That the laws and ordinances of Porto Rico, now in force, shall continue in full force and effect, except as altered, amended or modified hereinafter, or as altered or modified by military orders and decrees in force when this Act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended or repealed by the Legislative authority hereinafter provided for Porto Rico, or by act of Congress of the United States, etc."

In Section 32 it was provided:

"That the Legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, * * * and also the power to alter, amend, modify and repeal any and all laws and ordinances of every character

now in force in Porto Rico or any municipality or district thereof not inconsistent with the provisions hereof. Provided, however, that all grants of franchises, rights and privileges or concessions of a public or quasi-public nature, shall be made by the Executive Council with the approval of the Governor, and all franchises granted in Porto Rico shall be reported to Congress, which hereby reserves the power to annul or modify the same."

By joint resolution of May 1, 1900, it was further provided that all railroad, street railway, telephone and telegraph franchises, etc., granted under Section 32 of the Organic Act, should be approved by the President of the United States, before the same could be operative; and it was further provided, that all such grants of franchises, etc., shall provide that the same shall be subject to amendment, alteration or repeal.

In pursuance of the authority conferred by the Foraker Act, the Legislature of Porto Rico, in 1902, enacted a new Civil Code, which went into effect July 1st of that year. The provisions of the Civil Code of 1902, applicable to the matters at issue in this case, will be found to be a virtual re-enactment, verbatim, of the Spanish Civil Code previously in force in Porto Rico, and in construing the law, recourse may be had to the treatises of text writers of authority upon the Spanish Civil law, as well as the decisions of the Supreme Court of Spain.

In *Perez vs. Fernandez*, 202 U. S. 80, the Court recognized as authority upon the interpretation of the law in force in Porto Rico, where the provisions of the code are similar, the treatises of Spanish text writers, as well as the decisions of the Supreme Court of Spain.

After this preliminary observation, we shall now proceed to consider the questions propounded above.

A. *What was the nature of the obligation, and what sum was recoverable for its breach under the law of Porto Rico?*

The law of Porto Rico upon the first question proposed may be briefly summarized as follows:

THE BOND IS AN OBLIGATION WITH A PENAL CLAUSE, AND THE AMOUNT OR PENALTY STIPULATED THEREIN IS A PREDETERMINATION BY THE PARTIES OF THE AMOUNT OF THE DAMAGES CAUSED TO THE OBLIGEE, BY A BREACH OF THE TERMS OF THE OBLIGATION.

We observe first, that the obligation in question is clearly an obligation with a penal clause, under the Civil Law.

It is either a conditional obligation or a penal obligation. The test of a conditional obligation is stated to be, that there is but practically a single obligation, as e. g. "I agree to pay you \$5,000 on condi-

tion that I do not a certain thing." In such case there is no direct obligation to do the particular thing, but only an obligation to pay if it is not done.

On the other hand it is said, "a penal clause is one by which a person in order to insure the performance of a contract, obligates himself to do a thing in case of non-execution." (Art. 1226 of the French Civil Code.) Applying this to the case at bar, we see clearly that here we have an obligation with a penal clause. The primary obligation, or contract upon which the other is based, is the contract to build the railway. The secondary obligation is to pay a certain fixed sum of money in case this is not done. The following example is given by Scaevola, an eminent Spanish text writer, of a penal obligation. It is "to obligate one's self to do a thing * * * and to add a penal stipulation in confirmation of the first obligation; for example * * * to build a house, and in case of failure to do so, to pay a certain penalty." *Scaevola,Codigo Civil*, Vol. 19, page 832 et seq.

The definition of a penal clause in the French Code, cited above, is quoted and approved by Scaevola in the same connection.

This difference is also recognized by Manresa, who is quoted in *Perez vs. Fernandez, supra*, as "a text writer of the highest authority," in his recent work *Comentarios al Codigo Civil Espanol*, Vol. 8, page 237 (see page 11* *infra*.)

Reduced to its simplest terms, and stripped of all legal verbiage, the bond in question is equivalent

to an obligation on the part of the principal to build the railway and power plant in accordance with the conditions of the ordinance, or, in case of failure to do so, the principal and sureties agree to pay the sum of \$100,000. It is not an indemnity bond.

It must be noted that the penal clause of the principal's obligation is the obligation which the sureties guaranteed. The sureties did not agree to build the road, but did agree jointly with the principal to pay the \$100,000, if the road was not built according to the conditions of the ordinance.

A similar provision was construed, under the law of this country, in **Clark vs. Barnard**, 108 U. S. 436, where this Court held that a provision in a statute requiring a bond to be given by a grantee in the sum of \$100,000 conditioned on the completion of a railroad within a specified time, showed an intent that this sum should be paid absolutely in the event of a breach of the condition.

The bond, therefore, being in the nature of an obligation with a penal clause, the provisions of Section 1120 and 1121 of the Civil Code of Porto Rico (Revised Statutes and Codes of Porto Rico, 1902, page 1024) apply, viz:

"Section 1120. In obligations with a penal clause, the penalty shall substitute indemnity for damages and the payment of interest in case of non-fulfillment, should there be no agreement to the contrary. This penalty can only be enforced when it is de-

mandable in accordance with the provisions of this Code."

"Section 1121. The debtor cannot exempt himself from the fulfillment of the obligation by paying the penalty, unless such right has been expressly reserved to him. Neither may the creditor exact the fulfillment of the obligation and also the payment of the penalty, unless such right has been clearly granted him."

These sections correspond with Articles 1152 and 1153 of the Spanish Civil Code, and are a re-enactment of the same.

In construing these provisions of the Spanish Civil Code, **Scaevola**, quoted above, says in his **Codigo Civil**, Vol. 19, page 832:

"The penal clause is therefore substitutive. It is a pre-determination by the contracting parties of the amount of the loss and damages occasioned by the failure to execute the contract.

* * * * Can greater compensation for losses and damages be demanded than that specified in the penal clause?

Favard decides the question in the negative, declared that as the debtor has no right to have the amount of the penalty diminished on the ground that it is excessive, so the creditor cannot be heard when the same is insufficient to indemnify him.

This is, without doubt, the spirit of the Code in declaring that the penalty is in substitution of the indemnity. The parties foresaw the non-fulfillment of the principal obligation and agreed upon the amount of the indemnity to be granted to the creditor, there is no reason therefore, for removing things from the limits in which the contracting parties placed them, but their will should be respected and applied.

However, and for this very reason, the Code makes the reservation that something else may have been stipulated. If the creditor and debtor are agreed that a certain penalty should be paid upon the basis of the non-performance of the principal duty, but without prejudice, for example, to the obligation of making indemnity for a greater sum to which the damages caused may amount, who could object to such a covenant?"

We also find a similar exposition of these provisions of the code in **Manresa's Comentarios**, etc., Vol. 8, page 236, et seq, where it is said:

"The penalty always having the same foundation for making it enforceable, namely, the non-fulfillment of the principal obligation, it may have two aspects and distinct objects—either limited to its strict con-

dition as a penalty which punishes the breach committed, or as a means of repairing the damages implied in such breach. In the first case, the penalty does not solve but leaves intact the problem of indemnity; in the second case, as a general rule, it solves it, when it then signifies a hazardous, albeit legitimate, in view of the freedom granted by the law to contracting parties, calculation of the damages supposed to result from the non-fulfillment of the obligation, and a means of avoiding the difficulties of proof and even success, which, as stated in the proper place, may be presumed from the attitude of the courts in all actions for losses and damages. It is therefore indubitable that **the non-fulfillment of the principal obligation is sufficient to warrant the payment of the penalty**, and this is not only so when said penalty retains its strict character as a sanction (for it is then evident), but also when it possesses the character of a means of making reparation of losses and damages, the amount of which it is not necessary for the plaintiff to establish for the reason that it is fixed beforehand, and the existence of which it is likewise unnecessary to prove because it was precisely such discussions and difficulties which were sought to be avoided by stipulating the penalty."

The same interpretation of the law in this respect is given by another eminent Spanish text writer, **Sanchez Roman**, in his commentary on **Civil Code**, Vol. 4, pages 101 to 105, 107, 118, 119.

If further authority is needed for so clear an exposition of the plain provisions of the Code, we refer to the case of **Iglesias vs. Bolivar**, Porto Rico Supreme Court Reports, Vol. 1, page 62, where it is said: " * * * in obligations with a penal clause, the penalty takes the place of the indemnity for damages and the payment of interest in case of non-fulfillment."

In this case the court call attention to the fact that the foundation of the articles of the Civil Code which regulate obligations with a penal clause, was Law 35, title XI, partida 5 (of the Novisima Recopilacion), and that as a historical precedent this latter law should be taken into consideration in construing the Code, "inasmuch as same provided that if under a certain penalty, it was promised on a certain day to give or do a thing, and the same was not duly fulfilled, the penalty was required to be paid."

We also refer to the case reported in Vol. 1 of the year 1898, page 59 of the **Coleccion Legislativa, Jurisprudencia Civil** of Spain, in which the facts showed that the defendant entered into a contract in the Philippines with the plaintiff to work as a watch maker for five years, and it was stipulated that if the defendant should leave the employment contracted for after the said five years, he should not work at his trade in the Philippine Islands for an-

other five years under the penalty of \$2,000 for the breach of the obligation. The Court of Manila rendered a judgment in favor of the plaintiff for \$2,000, the full amount of the penalty stipulated without proof of actual damages. The judgment was affirmed by the Supreme Court of Spain on September 30, 1896.

To the same effect is a case which arose in the Philippines since the change of sovereignty, where a penalty stipulated in a contract was enforced without proof of damages. **Palacios vs. Municipality of Cavite**, Philippine Reports, Vol. 12, page 140.

The proposition would seem to be settled that, under the law of Porto Rico, for non-fulfillment of the principal obligation, and a breach of the conditions of the bond, the sum stipulated to be paid in such event, was recoverable without proof of any loss.

B. Did the plaintiff prove a breach of the conditions of the obligation?

It was contended by the defendant in the court below, and urged as one of the grounds for a non-suit (Record, pages 225 and 226), that the plaintiff had not shown a breach of the conditions of the bond. The trial judge overruled this contention and gave the only admissible interpretation of the bond in this respect. (See Record, pages 152-154.)

The bond must be construed just as though it was the sole obligation of the principal. The meaning of the words is not affected by the fact that the

party sought to be charged is principal, surety or guarantor. This is a principle of universal law.

In Brandt on Suretyship, (3 Edit.) Vol. 1. Sec. 107, page 235, it is said:

"The contract of the surety or guarantor being just as legal as that of the principal there is no good reason for holding that in arriving at the intention of the parties one set of rules shall govern when the principal and another when the surety or guarantor is concerned. To say that a certain set of words in a contract mean one thing when the principal is defendant, and that the same words in the same contract mean another thing simply because the defendant is a surety or guarantor, is absurd."

From the plain and unambiguous terms of the ordinance relative to the giving of the bond, and its discharge, as well as of the bond itself, we deduce the following:

The bond was not only conditioned upon the completion of the work within the construction period but upon compliance as well with all the terms and conditions of the ordinance relating to the construction period.

In the first place, it must be noted that the bond is to be construed in connection with the statute or ordinance under whose provision it was given, and whose terms relating thereto are necessarily read into the bond, besides being incorporated therein by express reference, and the annexing of a copy.

We again call attention to the fact that the duration of the franchise was 99 years (Sec. 36, Record, page 36) which was divided into two periods: (a) the "period of construction" (Record, page 36, line 1) of three years; (b) the period of operation extending ninety-six years thereafter.

The agreement to build the road and power plant was declared to be an indivisible contract. The government expressly reserved the right to insist upon full compliance with all the conditions relating to the construction work, and the franchise was **ipso facto** to become forfeited if the entire road was not completed and in operation within the limits of the construction period. A partial performance would not avail the grantee. (Sec. 16, Record, page 25.)

The execution and delivery of the bond was declared to be an acceptance of the terms and conditions of the grant of the franchise (Sec. 34, Record, page 35), and the bond having been given in pursuance of the ordinance, must be construed in connection with the provisions relating thereto. The purpose in requiring a bond for the sum of \$100,000 is shown by the provisions that it should be conditioned upon the completion of the work not only (a) within three years, but also, (b) **in accordance with the conditions therein contained**, applicable to the construction period, and (c) in accordance with the plans and specifications.

Sections 14, 15, 16, 17 and 18 (Record, pages 24-26) contain the conditions relative to the progress

of the work, and the several parts thereof. Time was thus declared to be of the essence of the contract so far as the construction work was concerned. These sections show that one of the principal conditions exacted from the grantee was that the work should be undertaken at once, and should progress without delay or interruption, and the bond was conditioned so as to enforce this, or the payment of the sum stipulated. These were vital conditions of the grant, and so declared to be in the ordinance forfeiting the franchise.

In Section 35, it is plainly provided that the bond is not only to be given to insure the completion of the work, but also **full compliance with the terms of the ordinance**. It is stated that the bond is not to be cancelled and returned to the grantee, except upon full compliance with the terms of the ordinance relating to the three-year construction period. The surety had knowledge of and assented to this condition of the ordinance relating to the giving and discharge of the bond, for it was recited in the bond that a copy of the ordinance was appended thereto. (Record, page 39, 11th line from bottom.)

The use of the word "**and**" in connection with the words "in accordance with the conditions herein contained," in Section 34 emphasizes this requirement, that the work should not only be **fully completed** within three years, but that its completion should also be in accordance with the conditions in the ordinance relating thereto.

Looking now at the bond which was presented by the grantee and its sureties for approval and acceptance at San Juan, and which was accepted as a substantial compliance with the requirements of the franchise, we find (a), that in no sentence or line of the bond is there any provision whatever inconsistent with or negating a single term or condition of the ordinance relating to the construction period; (b) that the bond plainly and expressly provides not only, *first*, for the completion of all the work within the construction period limited, but also, *second*, that the work must be done **in accordance with the conditions** contained in the ordinance, and *third*, in accordance with the plans and specifications.

This is a three-fold obligation including not only the completion of the work in the time limited, but its completion in the manner and upon the conditions specified in the ordinance relating thereto, and its completion in accordance with the plans and specifications. Default in **any one** of these three general provisions constituted a default and a breach of the bond. This three-fold obligation is annexed to the two succeeding conditions, which are included in the broad terms of the first condition, and then in order to make plain beyond any question that the bond covered not only the completion of the work within the construction period, but also full compliance (as was required by Sec. 35) with all the terms and conditions of the ordinance relating to the construction period and work, the fourth condition was added (Record, page 40) to the effect that the grantee should duly perform within the construction period

"all other terms and conditions required to be performed by the principal within said period."

It was not necessary to specify in detail the terms and conditions required to be performed within the construction period. It was enough after specifying some, to cover the others by the all-embracing words **"all other terms and conditions."** In this connection the use of the precise word **"terms"** in whose meaning is comprised that of a "fixed period or definite limit of time" (*International Dictionary*) is significant. The use of the words "within said period" restricts the covenants and conditions, whose performance was guaranteed, to those which were to be performed within the limits of the construction period, and excluded those which had reference to the subsequent period of operation. The endeavor to limit the words "all the others terms and conditions" to **some** of the conditions is futile in view of the plain language used. The matters of gauge and number of tracks would properly come under the head of the "plans and specifications," but at the utmost they are not the only conditions nor are they the most important, relating to the construction work.

And yet notwithstanding these express and oft-repeated provisions of both ordinance and bond, the Circuit Court of Appeals adopted the view that the bond was not conditioned upon compliance with the terms and conditions of Secs. 15, 16 and 18 of the ordinance (Record, pages 24, 25 and 259), but only the completion of the road in three years.

If there could be any shade of ambiguity, which

we deny, as to what was comprised in the terms of the bond requiring the work to be completed **"in accordance with the conditions"** contained in the ordinance having relation to the construction period and in the guaranty of the performance of **"all other terms and conditions"** required to be performed within the limits of the construction period, it would be wholly resolved by the language of the first proviso of the bond. If the surety only guaranteed that the work would be completed in three years without regard to the express conditions relating to the progress of the intermediate stages of the work of construction, there would have been absolutely no necessity for providing that no extension of **the time for completing any part of the work** should release the sureties. The fact that this clause was inserted is the strongest possible evidence that the conditions of the ordinance governing the progress of the different parts of the work were a vital condition of the grant, so recognized by all parties to the contract, and one of the conditions the performance of which were guaranteed by the sureties. There might, in view of the provisions of the Civil Code expressly providing that an extension of time granted a debtor without the consent of the surety should release the latter, have been some possible doubt, (although the government reserved the right to alter and amend the terms of the franchise,) as to the release of the surety by an extension, hence it was negatived in the strongest possible terms. If rules of construction are to have any weight, and oft-repeated and unambiguous condi-

tions in both the bond and ordinance mean anything, it would seem impossible to twist the language of the bond so as to exclude from its terms the guaranty of all the conditions as to the progress of the stages of construction work. And yet the Circuit Court of Appeals, discarding the construction of the bond adopted by the trial judge, limited the guaranty of the surety solely to the completion of the work in three years without regard to any of the conditions relating to the progress of the intermediate stages during the construction period, which were emphasized and re-emphasized in the ordinance and bond. This illogical and mistaken interpretation accounts for the errors complained of here. Granting that the construction put upon the terms of the bond by the Circuit Court of Appeals was right, then there would be some justification for the surety claiming a release by the forfeiture of the franchise before the three years, if it would have been at all possible for the principal to complete the entire work in the few months remaining after the franchise was repealed. The evidence showed, however, an absolute abandonment of the actual construction work by the grantee and an inability to proceed with the work through lack of funds. When it is said, however, (Record, page 262, middle), that the surety was injured because it might have gone on and finished the work at the end of the three years, the fact that the surety had no right to step in and build the road is lost sight of, and secondly, it is absurd to say that to save \$100,000, the surety would have spent several millions of dollars to construct a railroad ninety miles long,

and a power plant, in a tropical country, especially when at the completion of the work they would have had no right to operate it or to dispose of it, without the express consent of the government.

It is an idle and futile attempt, therefore, to try to limit the bond to a guaranty merely of the completion of the work at the expiration of the three years, without regard to the terms fixed and conditions prescribed for the progress of the work of construction. The construction contended for by counsel for the defendant is in violation not only of the spirit, but the letter of the instrument as well, and cannot possibly be sustained under any rule of construction.

As was said in the case of **Alexandria Water Co. vs. National Surety Co.**, 225 Pa. St., 1, 17, the construction urged by the defendant "deprives the plaintiff of the protection which it was manifestly the purpose of the bond to afford," and hence should not be adopted.

The plaintiff proved by William F. Willoughby, who was Treasurer of Porto Rico for six years, Secretary for two years, and a member of the Committee on Franchises, and later Assistant Director of the Census at Washington, as well as by the testimony of John S. Elliott, who was Commissioner of the Interior of Porto Rico at the time of the repeal of the franchise, that there had been a breach of the conditions stipulated in Sections 15 and 18 of the ordinance with relation to the amount of work required to be completed within one year from the

date of the acceptance of the ordinance, or as provided by the amended ordinance, before January 1, 1905; that only about two miles of the roadbed had been graded in spots; and also that, at the time the ordinance was repealed, **all work upon the ground by the grantee had ceased.** (See Record, pages 156-158, 214-216). It also affirmatively appears that the abandonment of the work was due chiefly to lack of funds (Record, pages, 210, 211), and inability to finance the road without the help of the government, (Record, page 135). The learned trial judge was therefore correct in his ruling that the plaintiff had shown a breach of the conditions of the bond.

The date when the repeal became operative by the approval of the President, May 12, 1905, was more than two years after the date of filing of the grantee's acceptance. Yet the grantee had not even filed the plans as required by Section 14, before the actual work of building the road should proceed (Record, pages 217, 218). There had been no substantial compliance whatever with the terms of the franchise and bond.

It will thus be seen that there are no equitable considerations in this case which should relieve the defendant from the plain obligations of the bond. There was nothing unreasonable or unconscionable in the sum stipulated to be paid for a breach of the bond, in view of the nature of the work, the valuable franchises entrusted to the grantee and the public interests involved. The government was lenient in

granting an extension of time, and only forfeited the franchise after a lapse of more than two years, when the grantee abandoned the construction work and was unable to finance the project.

C. Was the defendant released by the assignment or amendment of the original ordinance?

It must be noted that the sureties have bound themselves by the same obligation as the principal. Their obligation is express. Hence the extent of the liability of the sureties must be determined by an examination not only of the bond, but also of the terms and conditions of the ordinance, to which it refers and which is made expressly a part of the obligation.

It certainly cannot be claimed that the terms of the bond released the principal from any of the conditions or provisions of the ordinance applicable to the construction period. There is nothing in the bond that changes or abrogates a single one of these conditions or provisions of the ordinance.

The obligation of the sureties, therefore, being determined by the same instrument as that of the principal, the sureties, equally with the principal, must be held to have assented to the conditions of the ordinance applicable to the construction period. One of these conditions was that the terms of the ordinance might be amended or altered by the Executive Council; another was that the principal might assign the franchise; another was that the obligation of the grantee and its sureties should not be extinguished

and cancelled, unless all the requirements of the ordinance relating to the building of the road had been fully complied with. The sureties certainly could not complain so long as the object and principal conditions were not changed.

In the demurrer to the plaintiff's statement filed by the defendant, the claim was made that the sureties on the bond were released, because of the assignment of the franchise by the grantee to the Porto Rico Railway, Light & Power Company. This contention was abandoned at the trial, and was not made a specific ground for the motion for a non-suit, but we shall answer, in anticipation, any argument which may be presented on this point.

The all-prevailing answer to such a contention is found in the fact that such assignment was specifically contemplated, and provided for, by the terms of the original ordinance, (Sec. 30, Record, page 33), and the sureties must necessarily therefore have assented thereto. In the next place, the assignment was not the act of The People of Porto Rico, but solely the act of the grantee. In the third place, the grantee was not thereby released in any manner from its obligations on the bond. If the principal obligor upon the bond was not released, the surety could not be released. Section 1748 of the Porto Rico Civil Code provides as follows:

"The obligation of the surety shall expire at the same time as that of the debtor and for the same causes as all other obligations."

There was but one bond provided to be given to insure the completion of the railway and power plant, viz.: The bond required to be given before the ordinance should take effect and in Section 35 of the original ordinance, it was specifically provided that this bond was not to be cancelled or returned until the full completion of the work stipulated. It seems too plain for argument, therefore, that there was no release of the grantee contemplated by the assignment, and accordingly the sureties were not released from liability under the bond.

We proceed next, to the question whether the defendant was released by the amendment of the original ordinance, and contend it is clear, that neither under the law of Porto Rico, nor that of this country, was the defendant released.

The amendments did not change the object or principal conditions of the franchise, except as to the time of performance.

None of the amendments changed the character or object of the original ordinance, the only change of importance being the extension of the time. The other provisions as to the speedy and continuous progress of the work were inserted to guard, if possible, against the occurrence of a second default, were eminently reasonable and proper and necessarily must have been contemplated by the parties as the consideration for an extension.

It must be remembered that at the time the application for the amendment of the ordinance was

presented, the principal was in default, and both it and the sureties were liable to the payment of the sum named in the bond for a breach of its conditions.

What were the amendments included in the ordinance, approved August 2, 1904?

1st. The provision (Record, page 51) striking out the clause that the road should not pass less than a certain distance from two towns without the special consent of the Executive Council, was in fact no real change whatever. Under the terms of the original ordinance the road might go less than the distance mentioned if the Executive Council consented, the amendment simply had the effect of giving the consent of the Executive Council, if the grantee desired to locate the road nearer Rio Piedras and Bayamon than the distance mentioned.

2nd. The provisions of Section 4 made absolutely no change in the terms of the original ordinance. It simply expressed what was intended with regard to the manner of the exercise of the right to amend, alter and repeal reserved in the original ordinance, in accordance with the positive requirements of the organic law of Porto Rico, and this intention is shown by the fact that the amending ordinance itself was approved by the Governor and President.

This right being reserved to the Executive Council, the **manner** of its exercise must be assumed to be the legal method. The Executive Council was the body that must primarily act in the matter and take the initiative, and if the organic law required

the approval of the Governor and President to an amendment, passed by the Executive Council, then this must be held to be implied. It certainly would not be contended that a right of amendment or repeal reserved in a constitution or statute to the Legislature was ineffectual, because the approval of the Governor was required, and this was not specifically mentioned. The very ordinance granting the franchise commences "Be it ordained and enacted by the Executive Council of Porto Rico." But, as we have shown above, the provision of the organic law of Porto Rico, would be read into the franchise, even if no mention of the reservation had been expressly made in the latter.

3rd. We maintain that a reading of Section 2 of the amending ordinance will show that the provisions inserted as conditions of the extension of time were in the highest degree reasonable.

The claim urged that the provisions of this section **limited** to any specific number the men who might be employed in the prosecution of the work, we believe to be wholly incapable of being sustained by any fair construction of the language used. The provision is twice inserted that such number of men should be employed in the prosecution of the work as should be necessary to complete the same before January 1, 1905, and in view of the plainly expressed and reiterated intent and purpose of the provision, cannot be distorted or twisted from its plain sense.

The provision as to the employment of sufficient men and their payment weekly, in order to avoid

delay which had already been occasioned by failure to pay the men (Record, page 208) and strikes, were proper and reasonable requirements exacted as the consideration for the waiver of the default and breach of the bond that had already taken place.

In view of the provision of the bond, that no extension of time "shall in any way discharge the sureties," the Government would be authorized to exact reasonable requirements for the expediting of the construction work wholly in line and in consonance with the express provisions of the original ordinance as to its uninterrupted and speedy progress, as a consideration for the extension, the grantee being in default, and the sureties liable to the government for the amount of the bond by reason thereof.

Would it be contended that if there were no provision for amendment or alteration, other than an extension of time in the language of the first proviso of the bond, that the Government could not have required the grantee to pay \$25,000 or even \$100,000 for the extension asked? It did not see fit to make any such requirement, but, on the contrary, simply coupled with the grant of the extension reasonable conditions to insure the prompt completion of the work.

4th. The clause stating the extension was granted upon the express understanding that, upon the failure of the grantee to comply with the terms and conditions stipulated, the franchise was subject to immediate forfeiture at the option of the Executive Council, added nothing to the rights of the Executive Council

as they then existed. The right to repeal the franchise was contained in the original ordinance, and this broad power certainly included the right to repeal for the default of the grantee, and its failure to comply with the conditions upon which the franchise was granted.

We contend that this clause in the amending ordinance, was merely declaratory of the right the government already had to annul the franchise for a breach of its conditions and was inserted as a warning that special diligence must be observed as a consideration for the waiver of the default and extension of time.

Even if the right of repeal had not originally been reserved as one of the conditions attached to the grant of the franchise, its insertion as a condition or consideration of the extension for a second breach would have been a reasonable provision, since the extension was highly beneficial to the sureties, their liability having accrued under the bond by reason of the grantee's default. But, as stated elsewhere in this brief, the right of forfeiture was one of the express conditions of the original ordinance, and the provision in the amending ordinance was merely an emphasizing and reiteration of this right already reserved to the Government and the intention to exercise it in the event of a second breach of the conditions of the franchise by the grantee.

How the surety could be injured by a repeal after its obligation under the bond had become fixed by the grantee's default, when the surety had

no right to go on and build the road itself, especially when the right of repeal was one of the express conditions of the franchise, is certainly not clear.

It is important to observe the fact that the default shown by the evidence which forfeited the bond and led to the subsequent repeal of the franchise, was a default covered by the express terms of the bond itself, viz.: the failure to comply with the terms and conditions relating to the construction work covered by Secs. 15 and 18 within the time as extended, and not the breach of any additional duties imposed upon the grantee and not in the contemplation of the parties. The utmost that the surety could contend would be that if the default was in the breach of new and additional conditions merely, not contemplated or covered by the terms of the bond, then there was no breach in the obligations it assumed.

The default, however, not consisting in the breach of any additional conditions imposed, we contend that neither under the law of Porto Rico nor of this country would the surety be released. As authority for this, we refer to the citation from **Manresa's Commentarios** (page 23* infra.) where it is stated that such secondary conditions not constituting a novation would be complied with as agreements ancillary to the principal obligation; also to the cases of **Gausson vs. United States**, 97 U. S. 584; **Com. vs. Holmes**, 25 Gratt. 771; and **People vs. Vilas**, 36 N. Y. 459.

The claim made by the opposing counsel, that the provision of the bond that no extension of time should in any manner discharge the sureties excluded

all other changes or amendments of the ordinance, cannot be sustained under any proper theory or interpretation of the instrument.

The language of the provision is very significant. The clause was clearly not inserted for the benefit of the surety. It does not say that the surety shall be discharged by any change other than an extension, and this cannot be implied.

This provision was only an emphasizing of the right to extend the time, included in the right to amend and alter, and was plainly inserted in order to negative beyond question the express provisions of the Porto Rico Civil Code, Sec. 1752 (Page 1* infra.), that an extension of time without the consent of the surety released the latter.

Since there was thus a special reason for negating this provision of the code, the rule of "*Expressio Unius*" does not apply. (*Broom's Legal Maxims* (8th Ed.) p. 652.)

The only provision of the bond in anywise for the benefit of the surety, or which restricts the right of the Government in any way, is the limitation of the time within which action should be brought by reason of any default on the part of the principal, and this is not contrary to the provisions of the ordinance, but is outside of its provisions. Hence it may be absolutely asserted that in no respect did the bond nullify or abrogate or suspend the operation of any of the conditions upon which the franchise was granted, and one of these conditions was that the Executive Council should have the right to amend

and alter the same. This right, as stated before, is only qualified by the requirement that the amendments should be reasonable, and not materially change the object or principal conditions.

In the next place, we observe that under the law of Porto Rico, the amendments apart from the mere extension of time, were not of such a character as would constitute a novation, and thereby release the surety. The difference between the Spanish law, or the law of Porto Rico, and the law of this country, in this respect, was recognized by the learned trial judge, and he ruled that, if the law of Porto Rico governed the liability of the defendant upon the bond in question, the amendments to the ordinance did not constitute a novation so as to release the sureties. (See Record, page 155.)

The provisions of the Porto Rico Civil Code applicable to the determination of this question, which re-enact the provisions of the Spanish Civil Code, are Sections 1748 to 1754 inclusive, in connection with Sections 1124 and 1171 to 1181 inclusive. These sections correspond, respectively, to Articles 1847 to 1853 inclusive, and Articles 1156 and 1203 to 1213 inclusive, of the Spanish Civil Code.

In the Appendix to this brief, such of the sections referred to as bear upon the questions here presented will be found in full. (Pages 1*-4*, *infra*.)

In discussing this phase of the case, we have only to do with the question of the extinction of obligations by novation, so far as the surety is concerned.

The general principle of the Spanish law is that there must be a novation which changes the object or principal conditions of the contract, or which extinguishes the obligation of the principal, in order that the surety's obligation shall be extinguished. The only exceptions to this rule are those contained in Sections 1750 to 1753, and the only exception applicable to the facts of this case was expressly and emphatically negated in the bond itself. These articles in the Porto Rico Code are a re-enactment of the provisions of the Spanish Civil Code as specified above. By referring to Sections 1171 to 1181 of the Porto Rico Civil Code (page 2* *infra.*), which apply to the extinction of obligations by novation, the manner in which these provisions differ from the law of this country will appear. It is provided that in order that an obligation may be extinguished by another which substitutes it, it is necessary that it should be so **expressly declared, or that the old and new be incompatible in all points.** The corresponding article in the Spanish Civil Code is said to be taken expressly from the jurisprudence of the Supreme Court of Spain, and especially from the decision of that Court of October 23, 1865, which declared that the novation of a contract, accepted by both contracting parties, produced a true obligation and modified the one previously contracted. (See **Abella, Codigo Civil**, page 359, Note 2).

As further bearing upon the question as to whether the assignment or amendments of the*franchise released the surety, we refer to an eminent Spanish authority **Sanchez Roman, Derecho**

Civil, 2nd Ed. Vol. 4, pages 425 to 433, where we find the following statement of the law contained in articles 1203 to 1205 inclusive of the Spanish Civil Code (corresponding to Articles 1171-3 of Porto Rico Civil Code.)

"There is no novation arising from a change of debtor unless it is expressly stated that the original debtor is released and the new one assumes the debt. * * *

"The novation may result from a variance in the moving cause or object of the obligation, if the reason (razon) for the debt or the nature of the obligation be changed. Changes in other accidents, without varying the terms personal or real, subjective or objective, of the obligation, do not constitute novation as a general rule."

Manresa in his **Comentarios** in discussing the same articles (See page 23* *infra*.) says: "*** * *** this article requires as a peculiar requisite of the objective or real novation, that the change, when it occurs in the conditions and not in the object of the obligation, relates to the principal conditions. *This provision does not preclude covenants relative to secondary conditions; but it does not impart to them the force and importance of a novation, but they will be complied with as agreements ancillary to the principal obligation, and will serve to modify the same as far as they extend, and do not produce the extinction of the original obligation.*"

Prior to the enactment of the Spanish Civil Code of 1889, it was held that a modification of the period of time for performance, either reducing it or extending it, did not constitute novation, nor additional security such as a mortgage, bond or pledge or any change of a lesser consequence, in respect to the place and form of compliance. This is shown by Article 2397, page 916 of Vol. 1, of **Domat's Civil Law**, by Strahan (Cushing's Ed.), where the law is stated to be that if the creditor and debtor agree to make some changes in a former obligation, whether it be by adding to it a mortgage and surety or some other security or by taking the same away; whether it be by increasing or diminishing the debt, or by fixing a longer or shorter term of payment; or by making the debt conditional if it was pure and simple, or pure and simple if it was conditional; all these changes and others of a like nature, do not make any novation, because they do not extinguish the first debt **unless it were expressly stated that it would be**, and the first obligation subsists although it be not particularly mentioned that it is reserved, or that the said changes are made without any intention to novate.

The Supreme Court of Spain on November 20, 1878, held that an alteration in a contract by which monthly payments of 400 pesos as originally provided were reduced to 200 pesos did not constitute a novation of the contract, so as to release one of the parties who signed the obligation as an accommodation, although he did not consent to the alteration. **Jurisprudencia Civil**, Book 40, page 387 of the year 1878.

The Supreme Court of Spain also held on June 11, 1884; that a contract was not novated although the manner of making payments was changed by a new instrument. **Jurisprudencia Civil, Book 55, page 415** of the year 1884.

On June 28, 1904, the Supreme Court of Spain held that there was no novation in a case where the facts showed that the amount of the debt was considerably increased and a new writing substituted for the old one, with a provision in it declaring the old instrument cancelled. The particular question presented in the case was the priority of claims against an estate, and the Court decided that the original amount due under the old obligation was kept alive and retained its priority, notwithstanding the increase in the indebtedness by the terms of the new instrument and the declaration that the old one was cancelled, and therefore the facts and circumstances of the case were not sufficient to constitute a novation. **Jurisprudencia Referente al Codigo Civil, Book 12, page 904, year 1905.**

We also refer to a decision of the Supreme Court of Spain upon the question of novation delivered on June 17, 1902, in which it was held that there was no novation, in a case involving the following facts: A man living in Cuba insured his life in a New York insurance company. It was stipulated that the payment of premiums were to be made in New York under its laws, making the policy in effect a New York contract. It was also stipulated that the company might receive the premiums through local agents elsewhere than in New York. The in-

sured removed to Spain to reside permanently, and shortly thereafter applied to the company, through its local agent in Spain for a reduction in the amount of the premium, asking to be placed on an equal footing in that respect with other residents in the Peninsula. The reduction was agreed to. Suit was instituted in Spain to recover on the policy after the death of the insured. The company pleaded its privilege to be tried in New York, the situs of the contract. The plaintiff claimed that the reduction of the premium negotiated for through the local agent in Spain, constituted a new agreement which extinguished the original contract, and that the situs of the new agreement was in Spain. The Court denied the plaintiff's contention and dismissed the case for want of jurisdiction **Jurisprudencia Civil**, Book 10, page 411, year 1903.

We also refer to the case of **Gonzalez, et. al., vs. Bank of Spain**, which was an Appeal in Cassation, the judgment being published December 28, 1881, and inserted in the Gaceta of April 22, 1882, (**Jurisprudencia Civil**, Vol. 47, page 800.) The opinion in this case was written by Manresa, one of the judges of the Supreme Court of Spain, and the author of the Commentaries cited in our brief. The facts showed that the Bank of Spain appointed a collector of the Land and Industrial Tax, for account of the Bank, in a certain district, the collector engaging faithfully to discharge the duties of his office, and to deliver to the agent of the Bank the funds collected by him, the plaintiffs by way of further guarantee binding themselves as sureties to answer for the ful-

fillment of the obligations contracted by the said collector. The Government having desired to make a loan of 175,000,000 pesetas, and the same not having been taken up by subscription, distributed the loan among the Land and Industrial tax payers as a reimbursible advance of said taxes, the collection thereof being taken charge of by the Bank of Spain, and the Bank in turn entrusting the collection to the collector in question. The Bank instituted proceedings against the latter to recover for shortage in the collection of Land and Industrial Tax, as well as a shortage in the collection of the compulsory loan mentioned above, and an attachment was levied upon the property of the sureties. The sureties defended upon the ground, among others, that they simply guaranteed the performance of the collection of the Land and Industrial Taxes, and not the obligation of the collector with reference to the national loan. The Supreme Court decided against this contention and held the sureties liable upon the ground that the obligation of the sureties must be understood to have been contracted in the same terms and to the same extent as the principal obligation secured by it when not expressly limited or restricted; that the national loan could be considered as appertaining to the Land and Industrial Taxes, and since the sureties took no action looking to their exemption from the responsibility assumed by them as sureties until the execution proceedings were instituted against them for the recovery of the collector's shortage, could not complain, although the collector's duties and responsibilities were largely increased by the collection of the said

compulsory loan, since it must be held to be embraced in the general duties of the collector which the sureties guaranteed.

We also refer to the exposition of the principles of law relating to the extinguishment of obligations by novation from Manresa's **Commentarios al Codigo Civil Espanol**, (2nd Ed., 1907) Vol. 8, pages 417 to 423, found in the Appendix, pages 21* and 24* infra.

We also refer to the same author's Commentaries upon Article 1847 which corresponds to Section 1748 of the Porto Rico Civil Code, found on page 30* infra.

It may be noted in passing that the old Roman or Civil law did not presume a novation of an obligation for causes which are specified as effecting a novation in the recent codes of the Civil Law. Thus we find it stated in **Evans' Pothier on Obligations**, Vol. 1, page 345, that under the Civil Law an extension of time, or appointing of a different place for payment, or authorizing the payment to some other person than the creditor, or agreeing to take something else in lieu of the sum due, or a modification by which the debtor engages to pay a larger sum or the creditor to accept a smaller; in these and similar cases, according to the principle that a novation is not to be presumed it was held that no novation took place, and that the parties intended only to modify, augment or diminish the obligation, and not to extinguish the old debt and substitute a new one unless the contrary is particularly expressed.

It will be noted that under the Porto Rican Code, while some of the above circumstances are expressly declared to effect a novation, these are the only exceptions to the principles of the old Civil Law.

It is sufficient answer to the contention that under the Spanish law, the penalty is not recoverable for a breach of one of the conditions of an indivisible obligation, such as the one at bar, to say:

1st. That the parties clearly provided and intended that for **any** default of the principal in complying with **any** of the terms, and immediately **upon** such default, an action against the sureties accrued to the Government. This is shown by a reading of the second proviso of the bond. (Record, page 41.)

2nd. Under the Spanish law, as appears from the extracts from Manresa's Commentaries, commencing at the top of page 12* *infra*, the non-fulfillment of the principal obligation, warrants the payment of the penalty not only when the penalty retains its strict character as such, but also when it possesses the character of a means of making reparation of losses and damages.

If there could be any doubt as to the intention of the parties, as to whether an action would lie upon the bond in favor of the Government for a single breach of the conditions covered by the bond, it is wholly resolved by the language of the 2nd proviso of the bond (Record, p. 41.) Here it is necessarily implied that action may be brought against the surety

"upon or by reason of any default on the part of the principal in the performance of any of the terms, covenants or conditions of this bond," and yet it is seriously argued that no action would lie against the surety except upon a failure to fully complete the work, after the expiration of the construction period. How a plainer intent could be manifested that the obligation of the sureties was to become fixed upon a breach of **any** of the conditions or terms and immediately when such breach occurred, is hard to imagine.

D. Was the defendant released by the repeal of the franchise?

We think it is plain that there could be no release of the principal or the sureties upon the bond, upon failure to comply with its terms, if the Executive Council, in the interest of the public, after a breach of the provisions of the ordinance and bond twice repeated, exercised the further and additional right of forfeiting the franchise reserved in the original ordinance, and assented to by the sureties in view of the plain provisions of Section 2 of the repealing ordinance (Record, page 59). From the nature of the case, and the public interests that were directly involved in the building of the road and utilization of the valuable water powers necessary for the development of the Island, if the grantee failed to comply with the conditions upon which the franchise was granted, time being expressly of the essence of the contract, the right of forfeiture was a natural and

proper stipulation. This right was certainly not intended to be the only redress for absolute failure to comply with the conditions of the ordinance, otherwise no bond would have been required. The bond was not annulled by the repealing ordinance, but was expressly declared to be in force for the benefit of The People of Porto Rico. Furthermore, *the bond had become forfeited, and the liabilities of the obligors fixed, by the breach of its conditions, before the franchise was repealed.*

Under the law of Porto Rico, the sureties were not released from their obligations, by the repeal of the ordinance, unless the principal was thereby released. (Porto Rico Civil Code, Section 1748, page 1* infra.) If it appears from the terms of the ordinances that it was the intention that the principal was not to be released from liability for a breach of the conditions of the bond, upon a repeal of the franchise after and by reason of such default, then there was no release of the defendant surety. The original ordinance in Section 35, (Record, page 123) makes it clear that the bond was not to be cancelled, but was to be enforced, unless the work was completed and all the terms of the ordinance were met. The original ordinance expressly reserved the right of repeal, and if, in the repealing ordinance, the government reserved its right to proceed on the bond for breaches which had occurred prior thereto, the sureties could not complain. Under the plain facts and law applicable to the case, there was, therefore, no release of the defendant from liability for the breach of the conditions of the bond by the principal, be-

cause of the subsequent repeal of the ordinance in the manner and upon the terms above stated.

There was a condition in Section 16, (Record, page 25), that if part of the road was built and the entire road was not completed within the construction period, (or if the road was not operated by the grantee after the construction period), the franchise should **ipso facto** become null and void. It will be noted that this would take place without any action on the part of the Executive Council. In fact it required express action to prevent the franchise becoming forfeited.

There was in the second place, in Section 30, an express condition annexed to the grant, that the Executive Council should have the right to repeal the franchise. This right applied to the entire life of the franchise, both the construction period and the period of operation, and was only subject to the qualification that it must be a proper and reasonable exercise of the right, either because of failure of the grantee to comply with the conditions upon which the franchise was granted, or for reasons of public policy. In the latter case, if the principal was not already in default, neither principal nor sureties would be liable upon the bond.

Furthermore, this right was required by the supreme law of the land to be annexed as a condition to every grant of a franchise in Porto Rico.

It must be remembered that the ordinance in question is a special law, passed by the Executive Council, by virtue of the legislative authority vested in it by the Foraker Act.

Section 1057, of the Civil Code of Porto Rico, provides as follows:

"Obligations arising from law are not presumed. Those expressly determined in this Code, or **in special laws** are the only demandable ones, and they shall be governed **by the provisions of the laws which may have established them** and by those of this Book in regard to what has not been prescribed by said laws."

In accordance with these provisions of the Code, obligations provided for by special laws are governed by the provisions of the laws establishing them, and therefore we must look to the original ordinance, and the repealing ordinance, in order to determine what the legislature intended, so far as the question of a release of the principal or surety from the obligations of the bond by a repeal is concerned. As stated above, it is too plain for argument that no such release was intended, otherwise the careful provision for the bond was a senseless thing and a farce. Again, the repealing ordinance distinctly and positively refutes any such idea and expressly reserves the right to enforce the bond.

Section 2 of the repealing ordinance (Record, page 59), is in line with the provisions of the Political Code of Porto Rico enacted at the same time as the Civil Code. In Section 386 of the Political Code it is provided as follows:

"The repeal of any statute by the Legislative Assembly shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

Here it will be seen that so far as statutes passed by the Legislative Assembly are concerned, the repealing act must **expressly provide** that a liability under the repealed statute is released, or extinguished, before there can be any release or extinguishment thereof. The reservation of the right to enforce the bond was thus strictly in line with the policy of Porto Rican law.

Conceding, as it must be, that the ordinance, written acceptance and bond, together constituted a contract between the government and the grantee, then we submit that the broad right of forfeiture and repeal reserved to the former, certainly included the right to forfeit and repeal for a plain breach of the express terms and conditions of the grant, and that the sureties, having expressly consented to this by executing and delivering the bond, which was itself an acceptance of the terms and conditions of the ordinance, cannot object if, after and in consequence solely of the default of the grantee and the forfeiting of the bond thereby, the franchise was re-

pealed. The right of repeal of the franchise, and the right to the indemnity agreed upon, were by the terms of the ordinance both open to the government. It nowhere appears that if the grantee failed to comply with the terms of the franchise, and was in default, the **only** remedy of the government should be the forfeiting of the franchise. The bond was taken to secure the amount fixed and agreed upon for a breach of its conditions, and the right of repeal was an additional remedy, which was necessary if the general public interests were to be protected from further serious inconvenience and loss. Since the sureties, from the nature of the case, had no right, after a breach of the bond, to go on and complete the road, it was a matter of no concern to them, if the Government exercised the right it had reserved to repeal the grantee's franchise. Their liability under the bond had become fixed, and they could not in any event have removed it, if they had gone on and completed the road.

A case similar to the one at bar came before the Contentions Administrative Court of Spain in 1895, which is authority for the principle that the forfeiture of a franchise does not extinguish the right to the indemnity stipulated for the breach of its terms. The Contentions Administrative Court is a Court of last resort, having exclusive jurisdiction in matters relating to concessions from the Government, public works contracts, and other matters of a public or quasi-public nature arising under administrative laws. The case referred to, involved the following facts:

A man obtained a franchise to construct and operate a system of docks and piers in one of the harbors of Spain. He agreed to complete the works within a certain time, and deposited 40,000 pesetas with the government, instead of a bond, to insure compliance with the terms of his concession. The concession was obtained under royal decrees and orders; several extensions of time were granted to the grantee, but he failed to construct the works within the period finally fixed in the last grant of extension of time. The administrative officers declared the franchise to have lapsed, and forfeited the money to the government. The grantee of the concession brought suit, in the court above mentioned, on the ground that the concession was unlawfully cancelled, and in any event that his deposit should be returned to him. The court held against him on both points, and sustained the administrative officers. **Jurisprudencia Administrativa**, Book 1, page 937, year 1895.

It would seem that nothing could be clearer than that, under the law of Porto Rico, the repeal of the franchise did not in anywise release the principal nor the sureties from their obligations under the bond, fixed by the breach of its conditions.

* * * * *

Even under the law of this country the non-suit should not have been entered.

While we maintain that the law of Porto Rico governs the contract of suretyship in question, we

desire to submit a few considerations showing, as we believe, that even under the law of this country the non-suit should not have been entered.

It is a recognized principle of law that the intention of the parties is to govern in the interpretation of contracts, and that the courts will incline to that interpretation which will give the greatest effect to its plain provisions. Now the chief and paramount purpose of the bond provided to be given by the principal was to insure the building of the road and power plant in accordance with the conditions agreed upon, or in default thereof, the payment of the sum stipulated in the bond. This is emphasized over and over again in the ordinance by the numerous provisions requiring the speedy and continuous progress of the work. The damage to the government by reason of the failure to carry out the undertaking to build the road was real and great, but it could not be estimated by any exact pecuniary standard, and hence was necessarily predetermined and liquidated by the parties at the sum named in the bond.

The last clause of the condition, referring to damages accruing against the government by reason of the construction of the road was unimportant; in fact, it is difficult to understand to what it can apply.

Now, a construction of the instrument which would make the sum stipulated a mere penalty, and not a pre-determination and liquidation of the damages by the parties, would practically nullify

the instrument, and make it impossible to recover anything, if there was a total and absolute breach of the condition of the bond. Such a construction would make the taking of a bond, which the Executive Council were at such pains to prescribe, an utter farce and meaningless performance, as was said in **Clark vs. Barnard**, 108 U. S. 436. The learned trial judge ruled, nevertheless, that under the law of Pennsylvania, the sum named was only a penalty to secure the payment of actual damages which must be proved.

A careful reading of Sections 34 and 35 of the original ordinance (Record, pp. 35 and 36,) together with Sections 15, 16, 17 and 18 (Record, pp. 24-26) in connection with the fact that the giving of the bond was the **sine qua non** required before the franchise was permitted to be effective, is sufficient to show the clear intention that, for an absolute failure to complete the road in accordance with the conditions clearly and emphatically specified, the sum named in the bond was to be paid as predetermined and liquidated damages, inasmuch as it would be impossible to fix the damages sustained, by any exact pecuniary standard.

That the parties contemplated damage would ensue from the failure to build the road was certain from the nature of the rights granted to the Construction Company and in turn granted to the government by the latter. The use of two valuable water powers (Record, pages 148, 149) was given to the grantee, and it was important that these should be speedily developed. Numerous applicants had

sought grants of them, particularly that at Comerio Falls (Record, page 201). Furthermore the government was directly interested in the prompt building of the road because of the rights of free transportation for prisoners, guards, insular police, and militia (Secs. 27 and 28, Record, pages 31 and 32). It was also entitled to share in the receipts from the sale of electric light and power (Sec. 23, Record, p. 29); and it had the right to purchase absolutely the road and power plants. (Sec. 30, Record, p. 34, lines 7-9.)

The damage to the government upon a failure to build the road and power plant in accordance with the conditions as to time, as well as for an absolute failure to build the same, would necessarily be uncertain and incapable of exact ascertainment, and were properly subject to liquidation and agreement. The Court will take notice of the fact that the new Civil Government of Porto Rico had been in operation for less than three years, when the ordinance was passed; and it was important from the standpoint of properly policing and governing the Island, that the road between the capital on the north, and the chief seaport town on the south coast, should be finished and in operation as soon as possible, and that the franchise after being secured should not be peddled about for speculative purposes. These matters were therefore properly subject to adjustment, calculation and liquidation beforehand by the parties.

In view of the damage and inconvenience to the government from the failure of the grantee to comply with the conditions of the franchise, as well as the importance and extent of the transportation

and water powers which were the subject of the grant, the sum of \$100,000 specified in the bond, was in no sense unconscionable, but a reasonable and proper sum to be paid to the government.

In many States the courts have held that the rule applicable as between private individuals does not apply where the sum stipulated to be paid for a breach of a contract relating to a public franchise is fixed by the State or municipality as the condition of granting the franchise, and while not strictly a statutory penalty, is in the nature thereof. See *Salem vs. Anson*, 91 Am. State Rep. 485; *Nilson vs. Town of Jonesboro*, 57 Ark. 168, 20 S. W. 1093; *City of Indianola vs. Gulf etc. Ry. Co.* 56 Tex. 594; *Brooks vs. City of Wichita*, 114 Fed. Rep. 297; *Harris County vs. Donaldson*, 20 Tex. Civ. App. 9; *Joyce on Damages*, Vol 2, Sec. 1330, p. 1467.

The rule is also different where sums are stipulated to be paid as damages under engineering contracts for failure to complete work in time.

Wait on Engineering and Architectural Jurisprudence, Sec. 318, pp. 261, 262.

Furthermore, the conditions of the bond were so interdependent, and correlated, as to form practically a single condition, viz, the completion of the work in accordance with the conditions of the ordinance and therefore, for a total breach, the entire sum named was recoverable.

This principle is stated in **Pomeroy's Eq. Jurisp.** (2nd Ed.) Vol. 1, Secs. 442 and 443 and in notes on pages 606 and 608, as follows:

"The mere fact, however, that an agreement contains two or more provisions differing in kind and importance, does not of itself necessarily bring it within the operation of this rule. If the various acts stipulated to be done are but minor parts of one single whole—steps in the accomplishment of one single end—so that the contract is in reality one, then it may properly come under the operation of the second rule as given in the text."

"In applying this second rule of the text it is important to observe that a contract may come within its scope and operation which includes various particulars differing in kind and importance, provided they are in effect one; all taken together only make up one whole, the violation of which is to be compensated by the fixed sum. In other words a contract of this kind does not necessarily fall under the third rule given in the text; but the sum made payable may be liquidated damages. The intention of the parties, however, as ascertained from the whole instrument would guide the court."

So far as that portion of the condition of the bond is concerned providing that the grantee should

pay all loss, damages and costs accruing against the Government, it is clearly of no effect for want of anything to apply to. It was undoubtedly inserted out of excess of caution under the idea that the Government might be liable to suit by parties whose property the grantee took or damaged in the construction of its road. The law of Porto Rico provides for the right of eminent domain, and the provisions as to its exercise and compensation for damages are similar to the laws of this country. An action would not lie against the Government by reason of the exercise of this right by the grantee of a franchise in Porto Rico any more than such an action would lie in this country. Furthermore the government of Porto Rico could not be sued by property owners or citizens of Porto Rico. It is immune from suit in the same manner as a State is immune from suit. For authority upon this point, we refer to the cases of **Hans vs. Louisiana**, 134 U. S. 1, and **Territory of Wisconsin vs. Doty et. al.** 1 Pinnell (Wis.) 396.

We therefore believe that, even under the law of this country, the courts would construe the bond so as to give effect to its plain intent and purpose, and since plaintiff proved an absolute breach of the terms of the bond, would permit a recovery of the sum named therein, as predetermined or liquidated damages.

Neither do we admit that under the law of Pennsylvania, in view of the express terms of the original ordinance and bond, the defendant was released, as was held by the learned trial judge, by

the amendment or repeal of the ordinance. The provision as to the right of the Executive Council to amend, alter or repeal the rights, privileges and concessions granted by the ordinance, which was annexed to and made a part of the bond by reference thereto, coupled with the provision in the bond (inserted in order to negative beyond question the provisions of Section 1752 of the Porto Rico Civil Code, that an extension granted by the creditor to the principal debtor, without the consent of the surety should release the latter), that "no extension of the time or times limited in said ordinance for the completion of the work therein authorized or any part thereof, whether granted with or without the knowledge and consent of the sureties, shall in any way discharge the sureties from liability upon this bond," was ample authority even under the law of Pennsylvania, for the enactment of the amendments, which did not change in any material way the object or essential terms of the original ordinance, as well as for the repeal of the franchise for a breach of its conditions, under the express provisions of the ordinance, which, coupled with the reservation of rights against the principal and its sureties on the bond in the repealing ordinance, negative any theory of a release of the defendant from liability.

Nothing can be plainer than that the government intended to save its right to sue upon the bond by the provisions of Section 2 of the repealing ordinance. The principle is well expressed in the following citation from *Amer. & Eng. Ency. of Law* (1st Edit.) Vol. 23, page 436, etc.:

"A saving clause in a statute is an exception of a special thing out of general things mentioned in the statute; it is ordinarily a restriction in a repealing act, and saves rights, pending proceedings, penalties, etc., from the annihilation which would result from unrestricted repeal. The particular intent expressed in a proviso or exception will control the general intent of the enactment. * * * * The rule that all parts of a statute are to be construed together, and effect given to the whole if possible, is to be observed in the construction of provisos and saving clauses."

See also on this point *Com. vs. Sullivan*, 150 Mass. 315; *Brotherton vs. Brotherton*, 41 Iowa 112; *Com. vs. Desmond*, 123 Mass. 407; *Lincoln County vs. Oneida County*, 80 Wis. 267; *Hall vs. Hall*, 64 N. H. 295; *Chittenden vs. Judson*, 57 Conn. 333; *United States vs. Keokuk etc., Bridge Co.*, 45 Fed. Rep. 178.

Incidentally, we submit that the learned trial judge erred in his view as to the effect of the repeal of the ordinance, even under the law of Pennsylvania, and refer, to the case of *Faunce vs. Burke & Gonder*, 16 Pa. St. 469, where it is held that a contract may confer the right to forfeit and annul the same for the breach of its terms, and also an enforcement of the penalty fixed as a means of reparation for failure to perform the contract.

That this has also been held to be the law in other States is shown by the cases of *Wolfe vs. Des Monies & Ft. D. R. Co.*, 64 Iowa, 380 (20 N. W. 481) cited in 4 L. R. A. (N. S.) 755, (note), and

Geiger vs. Western Md. R. Co., 41 Md. 4, in both of which the right to annul a contract for a breach was upheld, in addition to the forfeiting of a sum agreed upon as pre-determined damages for the breach.

To the same effect are the cases of **Way vs. Reed**, 88 Mass. (6 Allen) 364; **City of Newton vs. Devlin**, 134 Mass. 490; **Getchell & Martin Lbr. etc. Co. vs. National Surety Co.**, 100 N. W. 556; **Rittenhouse vs. Mayor**, 25 Md. 336; **Bothfield vs. Gordon**, 190 Mass. 567 (5 L. R. A. New Series, 764.)

Jurisdiction.

Inasmuch as the counsel for defendant at the opening of the trial moved to dismiss the suit for lack of jurisdiction, which motion was denied by the court, it may not be out of place to refer briefly to the facts and principles of law upon which the jurisdiction rests. The People of Porto Rico is a body politic, or corporation, created by and deriving all its powers and capacities from acts and resolutions of the Congress of the United States, particularly the so-called Foraker Act, the Organic Act establishing a government for Porto Rico, approved April 12, 1900 (31 Stat. at L. 77, Chap. 191). This being the case all suits brought by The People of Porto Rico are suits arising under the laws of the United States under the principle laid down on **Osborn vs. Bank of United States**, 9 Wheat. 738, 823, decided over eighty-five years ago, reaffirmed in **Pacific**

Railroad Removal Cases, 115 U. S. 1, and steadfastly adhered to down to the present time, as shown by the late case of **Matter of Dunn** 212 U. S. 374. Inasmuch therefore, as the plaintiffs claim amounted to \$100,000, exclusive of interest and costs, and was a suit of a civil nature, under the terms of the Act of March 3, 1875, as amended and corrected, (U. S. Comp. Stat. 1901, p. 508), the Court had jurisdiction of the cause of action beyond any controversy. Authorities upon this point might be multiplied, but we do not wish to unnecessarily encumber the brief.

If any authority is needed for so elementary a proposition that a body politic is a corporation, or that a corporation is a **body politic** which may or may not have governmental powers, we refer to the following authorities:

In **Bouvier's Law Dict. (Rawle's Revision)** Vol. 1, p. 443, a corporation is defined as follows:

"An artificial being, created by law, and composed of individuals, who subsist as a **body politic** under a special denomination, with the capacity of perpetual succession, and of acting, within the scope of its charter, as a natural person." (Citing 112, Ill., 293.)

In **McIntosh's History of England**, page 31, quoted in **Bouvier's Law Dictionary**, Vol. 1, page 443, it is said: "A corporation is modeled upon a state or nation, and is to this day called a **body politic** as well as corporate—thereby indicating its

origin and derivation. Its earliest form was probably the municipality or city, which necessity exacted for the control of local police of the marts and crowded places of the state or empire."

Finally, the definition of a corporation by Blackstone, quoted by Chief Justice Marshall in **Dartmouth College vs. Woodward** 4 Wheat. 518, 657, is as follows: "It is a franchise for a number of persons to be incorporated and exist as a body politic, with a power to maintain perpetual succession, and to do corporate acts. * * * *"

Coming directly to the reason for the decision that cases brought by or against corporations created by Congress present cases arising under a law of the United States, we affirm there can be no question but that The People of Porto Rico, as a body politic, not only owes its creation, but derives all its powers and capacities from Acts of Congress, which has full power to legislate for the territories.

Upon this point, we cite the case of **Downes vs. Bidwell**, 182 U. S. 244, where it is said:

"That the power over the territories is vested in Congress without limitation, and that this power has been considered the foundation upon which the territorial government rests, was also asserted by Chief Justice Marshall in **McCulloch vs. Maryland**, 4 Wheat. 316, 422, and in **United States vs. Gratiot**, 14 Pet. 526."

In **First National Bank of Brunswick vs. Yankton**, 101 U. S. 120, it was also held that Congress may legislate for territories as a State does for its municipal organizations; that it has full and complete legislative authority over the people of the territories, and all the departments of the territorial governments. From this it necessarily follows that all the powers and capacities of the territorial governments, or in this case **The People of Porto Rico**, the body politic created by Congress with governmental powers, are created by and derived from Congress. Every action brought by **The People of Porto Rico**, therefore, presents a case arising under the laws of the United States, under the principle established in **Osborn vs. Bank of United States**, and never departed from.

In **Cohens vs. Virginia**. 6 Wheat, 379, 392, Chief Justice Marshall said:

"The jurisdiction of the Court, then, extended by the letter of the Constitution to all cases arising under it or under the laws of the United States, it follows that those who would withdraw any case of this description from that jurisdiction must sustain the exception they claim, on the spirit and true meaning of the constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed. * * * we think that the judicial power, as originally given, extends to all cases arising under the Constitution

or a law of the United States, whoever may be the parties."

This is quoted in *Ames vs. Kansas*, 11 U. S. 449 and the Court adds: "The judicial power of the United States extends to **all** cases arising under the Constitution and laws and the Act of 1875 commits the exercise of that power to the circuit courts."

Under these plain principles of law, the jurisdiction of the Court cannot be successfully assailed.

CONCLUSION.

The judgment should be reversed, and the case remanded for a new trial.

In conclusion we submit that the learned trial judge erred, first, in his ruling that the bond upon which the action was brought, was a Pennsylvania contract, and that it was on the contrary, by every principle of law, a Porto Rico contract, to be governed as to its interpretation, validity and effect, and the measure of the obligations incurred thereby, by the law of Porto Rico, having been made with the Government at San Juan, the seat of government, in accordance with the provisions of a statute of Porto Rico. In the next place, we believe it is clear, as the learned trial judge ruled, that under the law of Porto Rico and the evidence presented by the plaintiff, there was no release of the defendant from its obligations under the bond. In the third place, the right of repeal being one of the express conditions of the grant of the franchise, and having been exercised

solely because of a breach of the conditions of the bond and ordinance whereby the sureties' liability had become fixed, and the government having, furthermore, reserved its rights under the bond, the sureties were not released. Finally, the bond in suit being in the nature of an obligation with a penal clause, the penalty being "a pre-determination by the contracting parties of the losses and damages" occasioned by the failure to carry out the contract, and the evidence showing an absolute, not a technical, breach of the conditions of the bond, the plaintiff made out a case which entitled it to a verdict for the sum stipulated in the bond with interest. For these reasons we believe the judgment of the Circuit Court of Appeals should be set aside, the judgment of the Circuit Court reversed and the case remanded for a new trial.

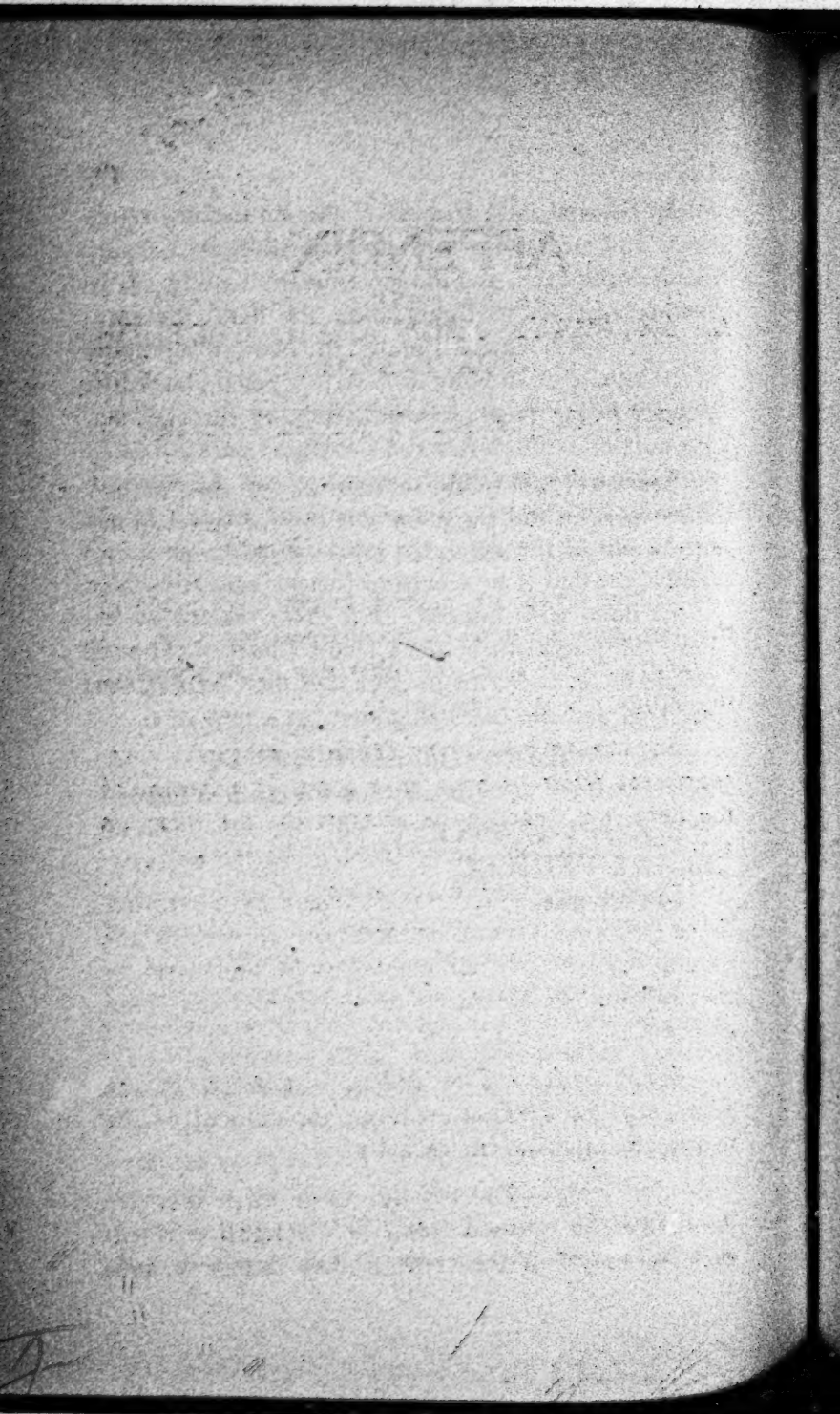
WILLIAM JESSUP HAND,

Attorney for Plaintiff in Error.

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APPENDIX

A2 EXTRACTS FROM CIVIL CODE OF PORTO RICO.

EXTINGUISHMENT OF SECURITY.

Section 1748.—The obligation of the surety shall expire at the same time as that of the debtor, and for the same cause as all other obligations.

Section 1749.—A merger which takes place in the person of the debtor and of the surety when one of them inherits from the other does not extinguish the obligation of the subsurety.

Section 1750.—If the creditor voluntarily accepts real estate or any other goods in payment of the debt, even should he afterwards lose them on account of eviction, the surety shall be released.

Section 1751.—Liberation, made by a creditor, of one of the sureties, without the consent of the others, shall benefit all the others to the extent of the portion of the surety to whom it had been granted.

Section 1752.—The extension granted to the debtor by the creditor, without the consent of the surety, extinguishes the security.

Section 1753.—The sureties, even when they are joint, shall be released from their obligation whenever by an act of the creditor they cannot be sub-

rogated to the rights, mortgages, and privileges of the same.

Section 1754.—A surety may set up against the creditor all the exceptions which pertain to the principal debtor and which may be inherent to the debt; but not those which may be purely personal to the debtor.

EXTINCTION OF OBLIGATIONS.

GENERAL PROVISIONS.

Section 1124.—Obligations are extinguished—
By their payment or fulfillment.

By the loss of the thing due.

By the remission of the debt.

By the merging of the rights of the creditor and debtor.

By compensation.

By novation.

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NOVATION.

Section 1171.—Obligations may be modified—

1. By the change of their object or principal conditions.

2. By substituting the person of the debtor.

3. By subrogating a third person in the rights of the creditor.

Section 1172.—In order that an obligation may be extinguished by another which substitutes it, it

is necessary that it should be so expressly declared, or that the old and new be incompatible in all points.

Section 1173.—Novation, consisting in the substitution of a debtor in the place of the original one, may be made without the knowledge of the latter, but not without the consent of the creditor.

Section 1174.—The insolvency of the new debtor, who may have been accepted by the creditor, shall not revive the action of the latter against the original debtor, unless said insolvency may have been prior, public, and known to the debtor when he transferred his debt.

Section 1175.—When the principal obligation is extinguished by reason of the novation, the accessory obligations shall only remain in force in so far as they benefit third persons who have not given their consent thereto.

Section 1176.—Novation is void if the original obligation is also so, unless the cause of nullity can be claimed by the debtor only, or the ratification gives validity to acts which were void in their origin.

Section 1177.—The subrogation of a third person in the rights of the creditor can not be presumed, except in the cases expressly mentioned in this Code.

In other cases it shall be necessary to prove it clearly in order that it may be effective.

Section 1178.—Subrogation shall be presumed—

1. When a creditor pays another preferred creditor.

2. When a third person, who is not interested in the obligation, pays with the express or implied approval of the debtor.

3. When the person who is interested in the fulfillment of the obligation pays, without prejudice to the effects of the confusion with regard to the share pertaining to him.

Section 1179.—A debtor may make the subrogation without the consent of the creditor when, in order to pay the debt, he may have borrowed money in a public instrument, stating his purpose and setting forth in the receipt the origin of the sum paid.

Section 1180.—Subrogation transfers to the subrogated the credit, with the corresponding rights, either against the debtor or against third persons, be they sureties or holders of mortgages.

Section 1181.—A creditor to whom a partial payment has been made may exercise his right with regard to the balance, with reference to the person subrogated in his place by virtue of the partial payment of the said credit.

(See page 21* *infra* for corresponding provisions of Spanish Civil Code.)

B. COMMENTARIES ON CIVIL CODE.

1. EXTRACTS FROM SCAEVOLA'S COMMENTARIES ON THE CIVIL CODE.

Vol. 19, p. 832, et seq.,

Effects of Penal Clause.—The Code provides, in article 1152, that the penalty takes the place of

the indemnity for damages and the payment of interest in case of non-compliance. The penal clause is, therefore, substitutive; it is a pre-determination by the contracting parties of the amount of the losses and damages occasioned by the failure to execute the contract. But as this is not sufficient to decide the various traditional questions on the subject, and as it also finds its complement in other provisions likewise intended to regulate the effect of penal clause we deem it advisable to raise and endeavor to dispose of such questions, which is the clearest manner of ascertaining the scope of the contractual penalty.

First Question.—Can the creditor demand the fulfillment not only of the principal, but also of the accessory, obligation? For example: The delivery of a horse has been agreed upon by a certain date, and in case of the failure to do so, the payment of a certain sum. Upon the maturity of the obligation, are both things due? Law 34, Title XI. Partida 5, says only one: "Although the penalty is inserted in the promise, the person making the same is not held to its fulfillment, and to do what he promised, but only to one thing." So, too, article 1153 of the Code provides that "the creditor cannot exact the fulfillment of the obligation and also the payment of the penalty, unless such right has been clearly granted him."

Fourth Question.—Can greater compensation for losses and damages be demanded than that specified in the penal clause?

Favard decides the question in the negative, declaring that as the debtor has no right to have the

amount of the penalty diminished on the ground that it is excessive, so the creditor cannot be heard when the same is insufficient to indemnify him.

This is, without doubt, the spirit of the Code in declaring that the penalty is in substitution of the indemnity. The parties foresaw the non-fulfillment of the principal obligation and agreed upon the amount of the indemnity to be granted to the creditor. There is no reason, therefore, for removing things from the limits in which the contracting parties placed them, but their will should be respected and applied.

However, and for this very reason, the Code makes the reservation that something else may have been stipulated. If the creditor and debtor are agreed that a certain penalty should be paid upon the basis of non-performance of the principal duty, but without prejudice, for example, to the obligation of making indemnity for a greater sum to which the damages caused may amount who could object to such a covenant?

Effectiveness of the Penalty.—Article 1152 is limited in its scope to a declaration that the penalty may be collected when it becomes enforceable in accordance with the other provisions of the Code. But concerning this no doubt whatever existed. On the other hand, upon a matter which could be open to discussion, namely, when the penalty will be enforceable, it was deemed advisable to limit it to a generalization.

Nevertheless, it is easy to understand that the

provisions referred to in article 1152 are also those which, with respect to obligations in general, determine the time when they become enforceable, and the liability of the debtor for their non-fulfillment. In the first place, and above other things, is the default, the most typical case of the non-performance of engagements, and the starting-point, in the obligations which we are now discussing, for the enforcement of the penalty. But the entire conduct of the debtor must likewise be taken into consideration; and not only liability for fraud, fault and contravention of the agreement, but also the absence of liability in a fortuitous case, will naturally be applicable to obligations with a penal clause. If the first obligation was not complied with by reason of some extraordinary event, and without negligence on the part of the debtor, there would be no occasion for the exaction of the penalty.

The Code alludes to all these observations by the phrase "when the penalty becomes enforceable." Similarly, the character of the principal obligation by reason of the conditions and the period of performance, and even by reason of its solidarity or indivisibility, will influence the penalty, which, in general, cannot be enforced except where performance should have been effected and has not been effected, as a consequence of acts of liability on the part of the debtor.

Commentary.—Nature of the Penal Clause.—"A penal clause is one," says Article 1226 of the French Code, "by which a person, in order to insure

the performance of a contract, obligates himself to do a thing in case of non-execution." To obligate one's self to do a thing, says Carleval, and to add a penal stipulation in confirmation of the first obligation; for example, to obligate one's self to write a book or to build a house, and in case of failure to do so, to pay a certain penalty or a certain liquidated or unliquidated amount of interest.

From these notions it may be inferred that the penalty may consist of a thing or of an act. It may also amount to the lapse of a right, to a decision, which was the case of the former **pacto comisorio** (an agreement to be performed on a day certain.)

It is also to be observed that there is something very similar between a conditional obligation and a penal clause. "Doest thou this, and if not thou shalt pay me such and such a sum." This obligation, imposed as a penalty, undoubtedly involves matters which may cause it to be confused on many occasions with an obligation subject to conditions. Indeed, it might be understood that the proposed clause amounted to this other conditional one: "Thou shalt pay me such and such a sum on condition that thou doest not such and such a thing." But the observation of such similarity is nothing new, but has already been noticed and discussed by the writers, who declare that when the obligation imposed is single, by means of clauses of the character referred to, it belongs to the class of conditional obligations; but that, on the contrary, one in which the obligation appears

to be of a dual nature belongs to the kind involving a penal clause. Thus, in the example given, it is to be observed that the obligations are twofold, one which is contracted as the principal obligation, that of doing a certain thing, and the other as subsidiary, that of paying a certain sum.

Great care should also be taken, however, not to confound obligations with a penal clause with those which are merely double. There are alternative obligations, namely, embracing two things, which have nothing in common with the penal clause. Even without being alternative, it is possible for the two obligations to partake of such character, as, for example, when an agreement is made in this form: "Thou shalt deliver to me your black horse in December, but if he shall have died, thou shalt deliver to me the white horse." Here are two obligations, one in case the other should fail but without it being possible to consider either of them as a penalty imposed for non-fulfillment.

2. EXTRACTS FROM MANRESA'S COMMENTARIES ON THE CIVIL CODE.

Vol. 8, Page 236 et seq.

SIXTH SECTION

Obligations With a Penal Clause.

Article 1152. In obligations with a penal clause, the penalty shall substitute indemnity for damages and the payment of interest in case of non-fulfillment, should there be no agreement to the contrary.

This penalty can only be enforced when it is demandable in accordance with the provisions of this code.

Article 1153. The debtor cannot exempt himself from the fulfillment of the obligation by paying the penalty, unless such right has been expressly reserved to him. Neither may the creditor exact the fulfillment of the obligation and also the payment of the penalty, unless such right has been clearly granted him.

Idea of Accessory Obligation; Penal Clause.— As we have already suggested in setting forth the classification of obligations, it is proper in the statement thereof to distinguish some which tend to their own special object, and which exist and may exist independently of any other obligation, called **principal**, from others subordinate to the existence of the former, the fulfillment of which is sought to be obtained by furnishing a guaranty, which is their object. These latter are denominated **accessory**, the characteristics of the same being, as we see, subordination to another obligation, and the guaranty for their fulfillment.

According to the forms of said guaranty, accessory obligations may tend either to increase the financial means by which the principal obligation may be enforced, or attribute to it a special obligation, and, certainly, some property, obligations of pledge, mortgage and bonds being liable for such purposes; or to recognize a judicial form of proceeding, such as the executory action, speedy and efficacious; or pro-

viding for an increase of liability, a specific sanction, in case of non-fulfillment, with the object of securing, upon the enforcement of what is due, the consideration of greater charges upon the obligor. This latter form of guaranty is the one which fulfills the penal clause of obligations, which subject is treated by our Code in this section, other accessory obligations relating to substantive law being considered in the titles of the appropriate contracts.

Upon sound principles the penal clause cannot be confounded, although in practice it may be attempted through error or the bad faith of the contracting parties, with the suspensive or decisive conditions of an obligation. There are notable differences between the condition and the penalty. The former amounts to constituting an obligation, even though it be accessory; the latter does not; therefore, the latter may become demandable in default of the unfulfilled principal obligation, or even with it; while the former, namely the condition, can never be required to be fulfilled, but, as this may happen or not, demand may be made for the fulfillment of the only obligation which it affects.

The penal clause may proceed from the law or from the obligation, and in addition thereto another distinction may be made of the penalty, of subsidiary or joint, according to which, on the supposition that the principal obligation be not fulfilled, it may be enforced in substitution of the former, or joined to the petition asking that said obligation be fulfilled.

Character and Source of the Penalty.—The

penalty always having the same foundation for making it enforceable, namely, the nonfulfillment of the principal obligation, it may have two aspects and distinct objects—either limited to its strict condition as a penalty which punishes the breach committed, or as a means of repairing the damages implied in such breach. In the first case, the penalty does not solve but leaves intact the problem of indemnity; in the second case, as a general rule, it solves it when it then signifies a hazardous, albeit legitimate, in view of the freedom granted by the law to contracting parties, calculation of the damages supposed to result from the non-fulfillment of the obligation, and a means of avoiding the difficulties of proof and even success, which, as stated in the proper place, may be presumed from the attitude of the courts in all actions for losses and damages. It is therefore indubitable that the non-fulfillment of the principal obligation is sufficient to warrant the payment of the penalty, and this is not only so when said penalty retains its strict character as a sanction (for it is then evident), but also when it possesses the character of a means of making reparation of losses and damages, the amount of which it is not necessary for the plaintiff to establish for the reason that it is fixed beforehand and the existence of which it is likewise unnecessary to prove, because it was precisely such discussions and difficulties which were sought to be avoided by stipulating the penalty. The effects of the penalty being understood according to this standard (which is the one expressly declared by article 656 of the Argentine Code), it results that the penal

clause comes to constitute in practice an exception to the general rules of indemnity for losses and damages.

Penalty and Indemnity Separate.—The rule of the Code is very clear; in the absence of a declaration to the contrary, the penalty substitutes the indemnity; but if expressly established, the one and the other may be inconsistent. The reason is no less clear than the rule; if the rigor of the penal law should be accepted, the penalty punished only the violation, and the compensation in damages remained; but when carried over to the civil law, such a distinction would be excessively severe and even improper. Hence it is presumed as a general rule that the penalty also serves to repair the damage, and such distinction is authorized only when it is expressly so determined.

Notwithstanding this, however, general opinion as well as our own is agreed that such incompatibility, as a general rule, between the penalty and the indemnity, is understood when the obligor agrees, the time having arrived, to pay the penalty; but it does not follow that he must be sued in the courts because he resists payment of the same, since then, the subsidiary as well as the principal obligation being unfulfilled, new damages are created for which payment will be made.

* * *

The Penalty and the Fulfillment of the Obligation.—The first part of article 1153 is very clear and requires but few observations. The reason of

it is evident; the penalty having been established as an accessory obligation, it cannot be admitted, as a general rule, that instead of guaranteeing the performance of the principal obligation, it utilizes the penalty for the purpose of leaving the latter unfulfilled, and the creditor cannot exact it.

The second part of said article gives rise to considerations of greater interest. First of all it is to be noted that, in contrast to above mentioned right of the debtor, which must be **expressly** established, that of the creditor to jointly exact the penalty and the fulfillment of the obligation only requires to be **clearly** granted—a different expression which includes the tacit form and authorizes interpretation and presumptions, provided that they are well-founded and have the effect of evidence.

It is also to be observed that the presumption, which is in reality just, of the law, contrary to said right of the creditor, presupposes an exception and even a contradiction to the greater severity which appears to be impressed upon obligations by the penal clause, inasmuch as, in the absence of the latter, and the problem of compensation being therefore subject to the general rules of article 1100 and subsequent articles, it is perfectly competent to demand the fulfillment of an obligation which was not fulfilled in due time and form, and indemnity for the damages occasioned by reason thereof.

We believe that, according to the general supposition of the law, the obligation being unfulfilled, the creditor may elect either to exact the penalty

or the fulfillment of the obligation; but with the difference that if he demands the first, he cannot thereafter require the second, inasmuch as both the obligor and obligee have decided to dispense with the execution of the agreement, and, on the other hand, by electing to demand the fulfillment of the obligation, he may, if this is not done, require the payment of the penalty.

Finally, it is undeniable that if a creditor who is not authorized to claim the penalty and the obligation at the same time should demand them, and not alternatively (for this he may do) but jointly, the exception of **plus petitio**, which may be interposed, should be directed against the penalty, since it is the accessory obligation.

Article 1154. The judge shall equitably modify the penalty if the principal obligation should have been partly or irregularly fulfilled by the debtor.

The penalty being in general equivalent to an indemnity agreed upon and calculated beforehand, which dispenses with the necessity of evidence and the consideration of matters relative to the consequences of non-fulfillment, the fixity of the amount of the indemnity determined upon is deduced as a logical sequence of such principle. But as we have seen in the commentaries on the foregoing articles that such principle may be modified, in some cases permitting of another separate indemnity which increases the amount agreed upon, so also, this article declares that through the influence of equitable causes as evident as those mentioned, there may be an ex-

ception in a sense contrary to the severity of said principle, permitting in such cases of a just diminution of the penalty stipulated as indemnity for absolute non-fulfillment.

This provision, taken in connection with the provisions of the preceding section, raises certain doubts with regard to the kinds of principal obligations permitted by its application; opinions existing according to which, although it appears to have been drafted to meet the case of a principal divisible obligation, it is more properly applicable in cases involving indivisible obligations, which are not such by the imperative exigencies of the nature of the object to which they relate. In order to clearly elucidate this question and understand the general nature of this provision, the terms of which are not limited to a specific group of obligations, it is necessary to start upon the basis of the disjunctive form in which it is drawn, according to which two methods may be employed in the fulfillment of the obligation as referred to in this article, viz., partial and irregular fulfillment; that is to say, default in strict fulfillment relates to the quantity or to the quality and to the mode or form. This being understood, the two hypotheses are admissible, and, therefore, application of the provision can be made in cases of divisible obligations; for it is the same thing to execute certain loans therein, but not all, as to carry said loans into effect, but not with strict subjection to the agreement; and in both cases an indemnity which is equivalent to that due for absolute non-fulfillment does not appear just. In respect of indivisible obligations,

this being essentially their object, it is clear that there is no room for the first contingency of partial performance, but there is in respect of the second, that of irregular fulfillment, and upon this latter hypothesis the provision will be applicable to the penal consequences of the indemnity still remaining unsatisfied.

Referring to obligations the indivisibility of which is not a compulsory consequence of the nature of their object, the conditions present make possible the two forms of anomalous fulfillment referred to in this article, but with the understanding that the application of said article is subordinate to the following explanation. It must not be admitted that the stipulation of a penalty in case of non-fulfillment causes the obligation to lose the indivisible character attributed to it, since the accessory obligation is not going to change the nature of the principal obligation, and therefore it cannot be understood that the debtor has the right to effectively impose upon the creditor the acceptance of an anomalous payment, completed with the payment of a part of the penalty. Far from this being the case, the indivisibility of the principal obligation authorizes the creditor to reject whatever is offered him upon this supposition, and if he does reject it, an action lies in his favor to demand the whole of the penalty. But if he accepts said payment, not according to the principal obligation, and thereafter claims the penalty as indemnity, the judge may reduce the amount thereof; provided, of course, that the amount paid is not capable of being completed by another person where

work is involved, as a complement with a distinct object when the matters refer to a person, or of utility in itself inherent; whenever, in fine, it does not practically amount to the absolute non-fulfillment of the principal obligation.

It was stated in the commentaries upon the foregoing articles, under the heading of "The Penalty and the Indemnity Separate," that the former is not at variance with the payment of the latter when the penalty has not succeeded in being enforced (in addition to the non-fulfillment of the principal obligation), and in order to accomplish it it is necessary to have recourse to the courts. Such a view cannot always be accepted in the cases in which this article 1154 is found applicable, since it is not always proper therein to forthwith pay indemnity for delay in the payment of the penalty, inasmuch as the amount to which the same is reduced must be determined by a judgment, not being in the meanwhile liquidated, and the legal doctrine stated in connection with articles 1100 and 1108 being therefore applicable.

The relation of this article to the last part of the foregoing article cannot fail to be of interest in determining up to what point article 1154 is applicable to the right of the creditor to concurrently demand the fulfillment of the obligation and the satisfaction of the penalty. There is no doubt that this article will be applied when partial or irregular payment of the principal obligation has been made before the creditor has made his claim; but, on the other hand, the judges cannot mitigate the amount

of the penalty when, said obligation having been absolutely unfilled, he claims the fulfillment thereof and the payment of the penalty; and this not only for the reason that article 1154, in using the words "should have been," clearly refers to a non-fulfillment already occurred, but because our Code, preferring to respect the liberty of the stipulation, has suppressed the declaration contrary to the solution which we suggest, which declaration was contained in the Code of 1851.

The decision of February 9, 1906, starting from the basis that the fact that payment of interest upon a loan may be required, no matter how exorbitant it may appear, cannot be ignored or repudiated and whether it is due upon the principal or the interest, nevertheless applied the provision of article 1154 in a case in which interest as enormous as it was iniquitous was agreed upon, upon the supposition that the penal sanction may exist in contracts, or be presumed therein, although nothing is stated, when, said interest having been agreed upon, it may be considered that the object in providing therefor is none other than to warn and force the debtor to obligate himself to performance.

Article 1155. The nullity of the penal clause does not carry with it that of the principal obligation.

The nullity of the principal obligation carries with it that of the penal clause.

The very clear rules of this article are based upon the rational and simple reason that the penal

clause being one of the various forms of accessory obligations, it partakes of the character thereof already mentioned, namely, the subordination of its existence to that of the principal obligation but not vice versa.

Some writers have imagined they saw, if not a contradiction at least a want of harmony between the provision of this article, which declares null the penal clause for the reason that it is the principal obligation which guarantees, and the provision of article 1824, which, in requiring a valid principal obligation as a requisite of the bond, nevertheless makes an exception of the case in which said bond is ineffectual owing to a personal defect of the obligor. In our opinion, there neither exists a contradiction or a motive for censure; obligations are involved, although both are accessory, and the penal clause and the bond contain distinct guarantees. The latter presupposes a third person having a different capacity from that of the obligor, and on the other hand the former does not require this complication of persons. Different provisions are therefore involved, and if in any case they are presented in connection with each other, the solution of the difficulty would be very clear, considering article 1155 as a general rule and article 1824 as an exception applicable whenever the contingency which is peculiar thereto is present, and there being a third person obligated, there is superadded on this account to his obligation the essential character of a bond to that of a penal clause with which it may be invested by accident.

We have, according to this provision, two forms of nullity of the penal clause; a nullity derived from the principal obligation, which occurs without regard to the lawfulness of the former, and another inherent, independent nullity, which will be considered according to the last paragraph of article 1152, in harmony with the general rules which determine the validity of obligations and regulate the freedom of contract.

The inherent, independent nullity of the penal clause, which it leaves in force, without in any way influencing the principal obligation, involves as a consequence that the effects of the non-fulfillment of the former are subject to the general rules of indemnity formulated in the Code and already explained. (Art. 1100 et. seq.)

SECTION SIXTH.

Novation.

Article 1203. Obligations may be modified—

1. By the change of their object or principal conditions.
2. By substituting the person of the debtor.
3. By subrogating a third person to the rights of the creditor.

Novation; Requisites and Effects.—A very obvious difference exists between this mode of extinguishing obligations and other modes previously discussed, in this that the latter generally produce an absolute extinction, while that effected by novation

is only relative; that if judicial relations continue to exist after the latter it will be by accident, such as the action over against the debtor when payment has been made by a third person; the assignment of actions to the creditor when the thing due is lost; the impeachment of the regularity of a waiver, etc.; while in cases of novation the continuance of such judicial relations is an indispensable, essential, and direct result.

We find, therefore, that novation, instead of extinguishing obligations, has the effect of changing them into other obligations (the modification referred to in the Code); but notwithstanding its lesser efficacy as to extinguishment, it does possess it relatively, inasmuch as, in the end, either one obligation is changed for another, the circumstances of which are different, or that entered into is transmitted to other persons, and therefore, either a particular obligation ends although another one begins, or the relationship terminates as to some persons although they are substituted by others.

By *novation*, therefore is understood the substitution or exchange of an obligation for another subsequent obligation, which extinguishes or modifies the former (1) by changing its object or principal conditons, (2) by substituting the person of the debtor, or (3) by subrogating a third person to the rights of the creditor, as declared by the article under examination, in accordance with our ancient jurisprudence based on law 15, title 14, of *Partida* 5.

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The changes possible in the original obligation

consist, as has been already stated, either in the object or conditions of the same, or in the persons who intervene therein, which give rise to the species of novation known as *real* and *personal*. The idea of the former is expressed by sub-division 1 of this article, and the two varieties of the latter are set forth in the other two sub-divisions of the article, since the change of persons may be either of the creditor or the debtor, and according to the fact the effects will be different, as the duties of each of said parties with respect to the judicial relationship are different. It should be noted that the three forms of novation are not irreconcilable, but are perfectly compatible, and a case may very well arise in which, upon a change of the persons, they may wish to modify the conditions established by the original contracting parties. When, therefore, two or three of said forms of novation occur at the same time, all of the provisions relative to each of them will be applicable.

When we come to discuss these provisions, we will insist upon the nature and effects of each form in particular; but at present we will only state that this article requires as a peculiar requisite of the objective or real novation, that the change, when it occurs in the conditions and not in the object of the obligation, relates to the principal conditions. *This provision does not preclude covenants relative to secondary conditions; but it does not impart to them the force and importance of a novation, but they will be complied with as agreements ancillary to the principal obligation, and will serve to modify*

the same as far as they extend, and do not produce the extinction of the original obligation.

Article 1204. In order that an obligation may be extinguished by another which substitutes it, it is necessary that it should be expressly so declared, or that the old and new be incompatible in all points.

Form of Novation—The text of this article shows, in the first place, that novation is not subject to any sacred manner of statement, to any indispensable and particular form, inasmuch as, in holding that it takes place by such a relative and debatable circumstance as that of incompatibility between the original obligation and the one newly contracted, it authorizes a tacit modification provided the same is fully established.

Hence it results that the novation may be express or implied, according as it may be declared, at the time of entering into the new obligation, that the same is carried into effect, or it so occurs from a comparison between the old and new judicial relations.

Even express novation itself is not subject to the necessity of employing a precise form, since the express declaration referred to in the law may be made by different words. When the formula employed is one extinguishing the old obligation, in such case, if the extinction is the result of the creation of the new obligation entered into for that purpose, novation takes place, but it will not be produced if it be stated that the former obligation was extinguished, since the basis thereof is then absent, it being a prior

relation which continues in existence up to the time the novation takes place. Upon this supposition such judicial relation will have been extinguished for another reason, to which allusion will be made when establishing a new bond for other purposes, such as the giving of a receipt, or stating that the security is discharged.

When the novation involves a change in the object, and it is expressly so declared, and that name is even given to it, but the modification does not consist, nevertheless either in the object or the principal conditions, which are requirements of the preceding article, no real and effectual novation takes place, since the contracting parties cannot alter the judicial nature of their acts. This is not equivalent to denying the validity of these small modifications, but is so as to their character as a novation, as has already been suggested in commenting on the foregoing article.

With regard to tacit novation, one in which doubts arise also involves a change in the object, since in other forms of novation the existence of a third person is an assured fact, which only requires the distinctions which we will explain in connection with the differences between novation and the assignment of a credit, or the mere right of representation for collection or payment.

Incompatibility between the original and the new obligation, which is necessary in the case of tacit novation, requires, as a general rule, that both obligations refer to the same object, the latter changing it and including it in a different manner, inas-

much as, so far as the rest is concerned, there is nothing to prevent the existence among various persons of different judicial ties, independent the one of the other, and none of which is extinguished by the appearance of another. When the object expressed is a specific thing, the novation will appear clearer, but incompatibility may also be shown when the second obligation makes express reference to the object of the first, e. g., to the specific sum of money in which the latter consists.

The change must consist, according to the foregoing article, either in the substitution of the object or in the change of the cause or principal conditions. In regard to the former, it is to be noted that while the giving in payment constitutes a novation, since it creates a new juridical relation, on the other hand there are other changes of the object, as an agreement for indemnity for non-performance, which, by guaranteeing the execution of the original obligation, can but illy signify the extinction of the same.

Article 1205. Novation, consisting in the substitution of a debtor in the place of the original one, may be without the knowledge of the latter, but not without the consent of the creditor.

Article 1206. The insolvency of the new debtor, who may have been accepted by the creditor, shall not revive the action of the latter against the original debtor, unless said insolvency may have been prior, public, and known to the debtor when he transferred his debt.

Novation by Substitution of the Debtor; Its Requisites and Forms.—Article 1205 expressly de

clares in what this kind of novation shall consist, since in declaring that another person be substituted in the place of the debtor, it states that it is not sufficient to extend the juridical relation to another person, but the placing of the latter in the position occupied by the original debtor is necessary.

A consequence of this is that the obligation contracted by a third person to become responsible for the debtor—the bond, in short—does not effect a real novation, inasmuch as the third person is not in the same place as the debtor; the latter continues in the first place with the same obligation, which the former guarantees.

It being necessary, therefore, that the third person should be a debtor, in the same place as the person obligated whom he substitutes, this change, and the consequent novation, may take place with respect to the debt as a whole, the debtor being absolved from all obligation, except for the unforeseen liabilities of which we will soon speak; or the former may continue with the character of such debtor, and the former third party may participate in such character also. In the former case, there is a complete and perfect novation; in the latter, there is a change which neither discharges the debtor nor authorizes the access obligations of said debtor to be considered as extinguished. Upon this latter supposition, if nothing is agreed upon with respect to the joint character of the obligation, the old and the new debtor must be considered as jointly and severally bound.



Article 1207. When the principal obligation is extinguished by reason of the novation, the accessory obligations shall only remain in force in so far as they benefit third persons who have not given their consent thereto.

The extinction of the old obligation by novation is a natural consequence of the nature of the latter, since it is, finally, the means of extinction of these judicial relations; but it may be that owing to defects in any of the obligations, the old or the new, the novation does not take place. It is to be noted in this connection that, as has been said in the commentaries upon article 1203, the essential and characteristic feature of this form of extinction is that if an obligation disappears, it is because another is brought into existence, the one being related to the other in such manner that the appearance of the subsequent obligation is indispensable to the extinction of the original one.

If the original obligation is extinguished only for the purpose of creating another one which takes its place, the validity of the latter is a requisite of the novation, because otherwise, the subsequent obligation being void, its object of extinguishing or modifying the former obligation could not be accomplished, since a thing which is void cannot produce any effect.

Hence, considering the circumstances of the novation and of the new obligation and the one which is the subject of the novation, it may be considered whether the latter has been extinguished or not, or

whether, in a proper case, it revives; and according to this, and in following the fate of the former, that which pertains to the different accessory obligations will be determined.

As to whether the novation by the change of the debtor authorizes the creditor to hold with respect to the new debtor and by him furnished, security equal to that which he had with relation to the original debtor, we understand that the answer must be in the negative, excepting, of course in case there has been an express agreement in the novation which establishes the necessity of furnishing such security. An oversight or omission is not to be presumed upon this point, which is of so great importance to the creditor, and, in any event, the express provisions or conclusions drawn from the new instrument shall be conformed to.

The exception contained in article 1207, in providing that the accessory obligations shall only remain in force in so far as they benefit third persons who have not given their consent thereto, requires, notwithstanding its clearness and foundation of justice, some explanation. Without doubt the provision refers to the case in which the principal obligation is given in favor of some person, and there is some stipulation for the benefit of another different person, which, although subordinate to the former, has some utility of its own which may be separately taken advantage of. If, instead of this taking place, the principal and accessory obligation are inseparable, then, as both affect the third person, either the

novation will be void including the principal obligation, or if it is valid with respect to the same, because the consent of the third person has been given thereto, the accessory obligation will also be extinguished, for it would have no foundation without the other.

Article 1847. The obligation of the surety shall expire at the same time as that of the debtor, and for the same causes as all other obligations.

Juridical Foundation of the Provisions of these Articles.—The provision set forth in the first of the articles which are the subject of this commentary, constitutes the principle established by the Code as a general rule applicable in all cases to the extinction of the security. According to said article, the juridical effects of the security, and therefore the obligation of the surety, cease at the same time as the obligation of the principal debtor, and for the same causes as other obligations are also extinguished.

The declarations made in this article are therefore two: The first, that which makes the continuance in force of the liability of the surety depend upon the principal obligation secured by the bond; and the second, that which admits the same causes which extinguish other obligations in general as causes of the extinction of the security. And we ought to discuss both provisions separately in order to proceed with due order in the study of the same, with a view of determining with suitable clearness the right sense and just understanding of each of them.

Subordination of the Continuance of the Obligation of the Surety to that of the Principal Debtor.

—This declaration of the law, and the rule thereby established, are a consequence of the special character and juridical nature of the contract of security. The obligation contracted being purely accessory, the same cannot continue in force, as far as the surety is concerned, by virtue of said contract, without the existence of the principal obligation to which it owes its origin; and, therefore, the former must cease or be extinguished as soon as the obligation of the debtor secured ceases or is extinguished, since from the time of the extinction of the latter the security is devoid of any object.

The surety, in effect, in consequence of the contract of security, binds himself solely and exclusively to fulfill the obligation guaranteed on behalf of the debtor, in case the latter does not do so at the time and in the manner agreed upon; and, therefore, it is perfectly evident that when the principal obligation ceases, either because it has been fulfilled by the debtor or for any of the other causes recognized by law, the surety is absolved from all engagements for the reason that there is then nothing to secure or guarantee. There is no necessity, therefore, for securing the fulfillment of something which has already been fulfilled, or which has been legally left without any existence; and as no pending obligation remains which falls within the terms of the security, the reason for its existence has ceased, and according to strict juridical principles the liability of the surety should be discharged, because his subsidiary obli-

gation cannot exist without another principal obligation to which it owes its origin.

This extinction is produced by operation of law without the necessity of a declaration to that effect, nor of any act causing a cessation of the effects of the security, but by the fact itself of the cessation of extinction of the principal obligation secured, that of the surety is extinguished, his liability ceasing as a matter of law. The foundation of this first provision of the article which we are examining, is therefore, the subsidiary character of the obligation of security, which does not permit the security to continue in force without a principal obligation upon which it depends.

The principle cannot be more exact. Nevertheless, in its practical application, certain difficulties are apt to arise which will be discussed further on, especially in connection with the modes of extinguishment of obligations, and this is what gives origin to the special rules contained in the following articles of the Code.

Application to the Security of the Causes of Extinction of Other Obligations.—The second of the declarations included in article 1847 makes all of the causes of extinction of obligations in general established in article 1156 extensive to the obligation contracted by the surety in the contract of security; and although, at first blush, it appears that said provision is unnecessary, and that the principle laid down in said article should be sufficient, when the motives which actuated the legislator in making such

declaration are well considered, the reason and the foundation thereof, as well as the propriety of its special insertion in the Code, are at once understood.

In the contract of security the surety binds himself, in effect, to fulfill that which the principal debtor is obliged to do, in case the latter does not fulfill his agreement at the proper time. Two distinct obligations are therefore related to the security—one a principal obligation resting upon the debtor or obligor, and the other a subsidiary obligation which is that contracted by the surety. And as the latter may be released from his pecuniary liability by the cessation of the principal obligation guaranteed by the security or by the cessation of the subsidiary obligation, even independently of the principal obligation and even while it continues in force the provisions of the article under discussion had to be amplified in order to include therein the extinction of the obligation of the surety in the two respects mentioned, namely, first by the cessation of the obligation of the debtor, and second by the cessation of the said obligation in any of the cases in which other obligations are extinguished. Hence the article unites said two causes of extinction by means of the copulative conjunction observed in the text, since otherwise, if its provisions did not have the scope which we have pointed out, and did not refer to the extinction of said obligations considered independently, it would have been given a different wording and it would not have had to refer to the causes of cessation indicated, the second part being superfluous, inasmuch as it was sufficient to say that

the obligation of the surety was extinguished whenever that of the debtor was extinguished.

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It is therefore necessary to apply the principles stated to the security in discussing the causes which extinguish contractual obligations. We have discussed them in the commentaries upon chapter 4 of, title 1 of this book of the Code, and we refer to what is there stated as an amplification of the observations which have been made.

Nevertheless, the general rules which we examined on that occasion are subject, as we have already stated, to certain more or less important modifications in their application to the security, which cannot be dispensed with without causing confusion, and we will therefore call attention to them in commenting upon later provisions.

Article 1851. The extension granted to the debtor by the creditor, without the consent of the surety, extinguishes the security.

The subsidiary obligation is extinguished in this case, also, notwithstanding the principal obligation continues in force, the extension, granted against the will or without the consent of the surety, constituting by virtue thereof one of the special causes or modes of extinguishing the security.

The reason or foundation of the provision established in this article is also the necessity of avoiding damages to the surety. In effect, the extension granted by the creditor to the debtor may injuriously affect the surety in so far as it may render the obligor

insolvent during the delay implied therein, thus preventing the surety from the beneficial exercise of the right to compensation or reimbursement granted him by law, in which case it would be unjust to exact liability from the latter for an act which is alone imputable to the party taking action. And although it is true that article 1843 grants him authority to proceed against the principal debtor, even before he has paid, among other cases when the latter has become bankrupt or insolvent, or when the period within which the debt should be satisfied has expired, in order that he may obtain the discharge of the security or a guaranty which will safeguard him from the proceedings of the creditor and from the danger of the insolvency of the debtor, it is at once understood that this remedy is not sufficient for the purposes suggested, and, therefore, the surety can be reconciled to the same only when said dangers occur within the period for which he was obligated; but it is by no means proper to oblige him to suffer such consequences against his will after the lapse of said period.

Moreover, by the extension, the conditions under which the surety became bound would in any event be altered, if, during the same, he should be subjected to liability under the security, which cannot be done, as is known, without the will of the surety himself.

For these reasons, the legislator has had to declare void, as against the surety, the extension granted against his will for the performance of the principal

obligation, this being the object of the statement made in the article which we are examining, by which means damages are avoided by the surety as a consequence of bad faith or negligence on the part of the creditor or debtor.

It is of course understood that the provision of the article cannot be applicable to a case in which the surety has given his consent to the extension, because the reason upon which it is based would then disappear, for on the contrary it states, and in such case it would very explicitly, the will of the surety to accept the consequences of the extension. Therefore, the provision is limited to a case in which the extension is granted without the consent of the surety, and in consequence thereof the security is extinguished; but in the former case it is not, since, although it is a universal principle of law sanctioned by article 1827 of the Code, "that the security cannot be extended further than the principal obligation," said principle is inapplicable when a fact arises from the continuance of the obligation which determines the scope thereof, such as the extension of the contract of security, voluntarily accepted by the surety, whose acceptance implies the consent given thereto. It has been so held by the Supreme Court in a decision of December 14, 1891, which declared that law 16 of title 12 of **Partida** 5 was violated in considering that the obligation of the surety in said case continues in force.

The consequences of the extension according as the surety may or may not have given his consent

having been determined, it remains for us to consider the question which is at once presented by an understanding of the present article.

Said article speaks only of an extension, but as the manifestation of the will of the parties may be express or implied, as we have already stated. Should the time granted to the debtor without claiming the debt be considered as a tacit extension, notwithstanding the fact that the period of claiming the same has expired?

This is a question passed upon by the decision of the courts, holding that the mere circumstance that the creditor does not demand the fulfillment of the obligation immediately upon the maturity thereof, and more or less delays the institution of his action, does not signify or reveal the intention of granting to the debtor any extension whatever.

The following is the case. A debt having become due on May 9, 1895, the debtor was sued in in executory proceedings on November 25, 1897, he being found to be insolvent. An action having thereupon been instituted against the surety for the principal of the debt and for interest, the claim was allowed in both instances; and an appeal in cassation having been taken by the surety, he cited the article under consideration as having been violated, alleging in support of his appeal that the judgment failed to take into consideration said article in the judgment appealed from, in order to exempt him from the obligation contracted by the debtor, notwithstanding that it had been established in the suit

that from the time the obligation matured until 1897 the appellant surety had not made demand for payment, either judicially or extrajudicially, and furthermore, that neither on the date of the promissory note giving rise to the debt was it protested, nor was notice given to him of non-payment by the principal debtor, thus revealing and determining, in his judgment, by the omission of said acts, the extinction of the obligation of the surety, since the debt not having been paid by the debtor on the day it became due, demand for payment should be made upon him in order that he might avail himself of the benefit of a settlement, by which he was of the opinion that the fact of the extension tacitly granted by the principal debtor without the consent, or even without the knowledge of the surety, has been established.

Nevertheless, the Supreme Court, notwithstanding the grounds set forth as proof of the violation in question, dismissed the appeal by a judgment of March 22, 1901, laying down the doctrine above mentioned.

It is not for us to make any criticism of said judgment, but as a demonstration of all that we have previously said, we ought to suggest that the mere lapse of time without the presentation of any claim by the creditor for the collection of the debt, cannot be considered as an extension not consented to by the surety of the obligation guaranteed by the security, since, according to sub-division 4 of article 1843, when the debt becomes enforceable by the expiration of the period, the surety may proceed against the debtor even before making payment, and if he

does not do so, and he suffers any damage for said reason, it should be imputed to him and he should bear the consequences, because the prolongation of his obligation is due to his own will.

The extension referred to in this article, therefore, is one not depending upon the acts of the surety, but one granted in an express manner by the creditor without the consent of the former.

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IN THE
Supreme Court of the United States.

No. 154. OCTOBER TERM, 1912.

THE PEOPLE OF PORTO RICO,
Plaintiffs-in-Error,

versus

THE TITLE GUARANTY AND SURETY COMPANY OF
SCRANTON, PENNSYLVANIA,
Defendant-in-Error.

BRIEF OF DEFENDANT-IN-ERROR.

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IN THE
Supreme Court of the United States,

No. 154—OCTOBER TERM, 1912.

THE PEOPLE OF PORTO RICO,
Plaintiff-In-Error,

vs.

THE TITLE GUARANTY AND SURETY
COMPANY of Scranton, Pennsyl-
vania,
Defendant-In-Error.

BRIEF FOR DEFENDANT-IN-ERROR.

Statement of Facts.

By ordinance passed the 2nd day of March, 1903, by the Executive Council of Porto Rico, approved March 3rd, 1903, by the Governor of Porto Rico, and by the President of the United States on the 21st day of March, 1903, the Vandegrift Construction Company was granted a franchise to construct a certain electric railway in the Island of Porto Rico and to construct electric works. In the 34th

section of the said ordinance it was provided, *inter alia*, as follows: (Record, page 35.)

"The franchises, privileges, concessions and rights herein granted shall be accepted by the grantee in writing and by executing a bond in favor of the People of Porto Rico in the sum of one hundred thousand dollars, satisfactory in form to the Attorney General and as to sufficiency to the Treasurer, and conditioned upon the full completion of the work herein authorized within three years after such acceptance and in accordance with the conditions herein contained and in accordance with the plans and specifications therefor approved as herein provided, and conditioned also upon the payment by the grantee to the People of Porto Rico of any loss or damage or costs accruing against the people of Porto Rico by reason of the construction of the works herein authorized at any time during the period of construction herein limited and before the completion thereof shall have been certified by the Commissioner of the Interior as in section 35 provided." (See Record, pages 39 *et seq.*)

The condition was that the physical work of constructing the railway and the electric works should be completed within three years from the date of the acceptance of the ordinance by the Vandegrift Construction Company. The ordinance was accepted by that company on the 24th of April, 1903. The bond was executed on the 23rd of May, 1903. Soon afterwards the Vandegrift Construction Company proceeded to survey the route and according to the testimony graded a part of the roadbed.

Section 15 of the ordinance (Record, page 24) provided that within one year from April 24th, 1903, the roadbed should be graded between the municipality of San Juan and the urban portion of the municipality of Caguas, and that a certain bridge named in said section 15 should also have its foundations and approaches completed with one year.

Section 16 (Record, pages 24 and 25) provided that within two years the Vandegrift Construction Company should have completed and in readiness for service for the conveyance of passengers and freight the parts of the railway lying between the urban portions of the municipalities of San Juan and Caguas and between the urban portions of the municipalities of Ponce and Jua-Diaz. No penalty or forfeiture was provided in the ordinance for the non-fulfillment of the work as specified in sections 15 and 16.

Section 16 further provided (Record, page 25) :

"It is, however, expressly understood and agreed that upon the failure by the grantee to complete and have its proposed line in full operation across the island within the time limited in section 17 hereof or upon its failure thereafter to continue the full operation of said railway line across the island, its right to operate any portion of the railway line in this ordinance authorized, or to distribute and sell electric light and power as herein granted, shall cease and determine and shall be taken and deemed to be forfeited and at an end."

Section 17 (Record, page 25) provided as follows: "Within three years from the date of such acceptance hereof the grantee shall have completed and in operation the entire line of railway herein authorized from its terminal in the municipality of San Juan to its terminal on the Playa of Ponce."

Section 18 (Record, pages 25 and 26) also provided that within one year of the date of the acceptance of the ordinance the grantee should cause the power dam at Comerio Falls to be completed, and within the same period should have constructed the major part of the electrical apparatus necessary for the transmission of the power to be obtained therefrom into electric energy. And further that the entire power plant and transmission lines necessary for operating the railway should be completed within three

years from the date of the acceptance thereof. There was no penalty or forfeiture provided in case the power dam above mentioned was not completed within one year.

Just one year, two months and thirteen days after the acceptance of the ordinance, to wit on the 7th day of July, 1904, the Executive Council changed materially the provisions of the franchise under which the bond was given, by an amendatory ordinance. This amendatory ordinance was approved by the Governor of Porto Rico on the 18th of July, 1904, and by Theodore Roosevelt, President of the United States, on the 2nd of August, 1904. (Record, pages 51, 52, 53 and 54.) By the provisions of section 2 of the amendatory ordinance it was provided as follows:

"Before the 1st day of January, 1905, the grantee herein shall cause the roadbed of said railway to be completely graded between the Island of San Juan and the urban portions of the municipality of Caguas."

It also limited the number of men that the Vandegrift Construction Company might employ on the work, the minimum number being fixed at 250 and the maximum at 500. It also provided that the men employed should be paid weekly. And it also changed the route provided for in the original ordinance. None of these provisions were contained in the original ordinance. By section 3 of the amended ordinance (Record, page 53) it was provided as follows: "Section 18 of said ordinance is hereby amended by striking out of said section the words 'within one year from the date of the acceptance hereof as herein provided,' appearing in lines 22 and 23 on page 9 of said ordinance, and substituting therefor the words 'before the 1st day of January, 1905.' And the said section is further amended by striking out the words 'within the same period,' appearing in line 24 on page 9 of said ordinance, and substituting therefor the words 'before the 1st day of January, 1905.'"

In the 2nd section it was provided as follows (Record, page 52): "And the grantee hereof shall also cause the foundations and approaches of its proposed bridge across the body of water flowing through the Bouqueron into the harbor of San Juan to be completed and shall have contracted for the material necessary for the superstructure of such bridge before the said 1st day of January, 1905."

And in the said section 2 it was further provided as follows (Record, pages 52 to 53): "That this extension of time wherein to finish the construction work in this amendment described is made with the express understanding that upon a failure of the grantee to comply with the terms and conditions herein set forth, the franchise granted to the Vandegrift Construction Company, approved by the Governor of Porto Rico on the 3rd of March, 1903, may, at the option of the Executive Council of Porto Rico, be subject to immediate forfeiture."

This ordinance (see Record, page 54) was to take effect immediately upon the acceptance by the grantee of the terms and conditions thereof as therein provided. There is no evidence in the case that the grantee ever accepted the terms of the amended ordinance.

One year and ten months after the acceptance of the original ordinance, and one year, nine months and one day after the date of the bond upon which this suit is founded, the People of Porto Rico, through their Executive Council, passed an ordinance repealing and ending forever all the rights and franchises of the Vandegrift Construction Company (Record, page 56 *et seq.*). **These changes contained in the supplemental ordinance and the repealing ordinance were all effected without the knowledge or consent of the defendant in error, and it will be seen that the physical work that the Surety Company agreed should be per-**

formed within three years was without its knowledge or consent limited to one year and ten months by the subsequent action of the People of Porto Rico and that the franchise was actually repealed fourteen months before the expiration of the three years, and rendered non-operative, null and void.

By the terms of this repealing ordinance the right of subrogation, the right to perform the physical work of construction that the Vandegrift Construction Company had undertaken to do within three years, was withdrawn from the Surety Company and all power to so perform was then and there taken away from it.

There was no saving clause in this repealing ordinance, but Section 2 thereof provided as follows (Record, pages 59 and 60):

"Section 2. All sureties or obligations of whatsoever character or kind heretofore given by the said grantee as a guarantee of the faithful performance of the obligations and conditions set forth in said ordinance are hereby declared forfeited to the People of Porto Rico to all and whatsoever intent the same shall be liable under the law."

The Circuit Court for the Middle District of Pennsylvania decided (Record, page 228 *et seq.*) that the sureties were not liable to any extent whatever under the facts established by the plaintiff-in-error on the trial in that court. The case was appealed to the Circuit Court of Appeals, Third Circuit, and the judgment of the Court below was there affirmed (Record, page 258 *et seq.*).

BRIEF OF ARGUMENT.

There are several grounds to rest the decision of the Trial Judge at Circuit and the Circuit Court of Appeals affirming his judgment in dismissing the action of plaintiff in error.

I.

The sum stipulated in the Bond is not Liquidated damages, but is a penalty, no actual damages were shown, and therefore plaintiff was not entitled to a verdict.

The bond is conditioned not only for the completion of the work in three years, but has another condition, to wit: that the People of Porto Rico shall be indemnified for any claims for damages that may be sustained by the citizens of Porto Rico during the construction of the road. This means that if in the construction of this road or the electric works any private person is damaged, so that he has a claim against the People of Porto Rico, the party granting the franchise, then the condition of the bond is that such damage shall be paid either by the principal or by the surety on the bond (Record, page 40). *Any such damage, as a matter of course, is susceptible of exact ascertainment.*

"A sum fixed as security for the performance of a contract containing a number of stipulations of widely different importance, breaches of some of which are capable of accurate valuation, for any of which the stipulated sum is an excessive compensation is a penalty."

Sedgwick on Damages, Vol. 1, 8th Ed., §413.

"Where a contract contains several provisions for the performance of various acts and for a breach of some of them the damages can be easily estimated, while for others they are difficult or incapable of measurement by any pecuniary standard, a sum designated in the contract as payable for a breach of any one of such stipulations will be construed as a penalty and not liquidated damages."

Joyce on Damages, Vol. 2, Sec. 1305.

"Where in a contract which provides for the performance of several acts of different degrees of importance there is a stipulation that one designated sum shall be paid in case of a breach of the contract, and the actual damages for part or all of the breaches can be computed, and the sum designated would be excessive for any of the breaches, such sum will be regarded as a penalty and not as liquidated damages."

Joyce on Damages, Sec. 1307.

"Where the agreement imposes several distinct duties or obligations of different degrees of importance and the same sum is named as damages for a breach of either indifferently, the same is to be regarded as a penalty."

Ency. of Law & Proc. Vol. 13, p. 93.

Again in the same book, page 96, it is said:

"Where damages for breach of some of the covenants of an agreement can be readily ascertained, yet there are others where the loss would be difficult to estimate, the damages will usually be construed as a penalty and not as liquidated."

In *March v. Allabough*, 103 Pa. 335, Mr. Justice Clark, speaking for the Supreme Court of Pennsylvania, says:

"That where the covenant is for the performance or omission of various acts which are not measurable by any exact pecuniary standard, together with one or more acts, in respect of which the damages on a breach of the covenant are certain or readily ascertainable by a jury, and there is a sum stipulated as damages, to be paid by each party to the other for a breach of any one of the covenants, such sum is held to be a penalty merely and not stipulated damages."

A contract for extensive grading, with a clause which provided that ten per cent. should be retained from the engineer's estimates, which was to be forfeited if the work was not completed at the time and in the manner agreed on, and should be liquidated damages for the non-performance of any of the plaintiff's undertakings contained in the contract and where some of the undertakings were unimportant and trivial was considered in the case of *Monmouth Park Ass'n vs. Warren*, 55 N. J. L. p. 598, reported in 27 Atl. Rep. at p. 932, and the Court said:

"The rules of construction applicable to contracts of this sort have been recently laid down in this court with such fullness and precision as to render it quite unnecessary to repeat them. *Monmouth Park Asso. v. Wallis Iron Works*, 55 N. J. L., 132, reported in 26 Atl. page 140. Applying those rules to this contract I think there is no doubt that the construction given below was correct. The parties agreed that for non-completion of the work at the time and in the manner specified, the retained 10 per cent. was to be forfeited; but they also agreed that the same money should be liquidated damages for the non-performance of any of Warren's undertakings contained in the contract. The whole clause must be construed together, and the intent of the parties must be ascertained therefrom, and from a consideration of the scope of their bargain, and the subject to which it relates. An examination of the contract shows several undertakings on the part of Warren of a com-

paratively unimportant and trivial character. Damages for the breach of any of them must necessarily vary widely from the damages sustained by the breach of the contract to perform the work, which was its main purpose. Under such circumstances, the parties must have intended the sums retained as a penalty to be forfeited only on proof of and to the extent of actual damages. There was no error in this ruling."

In *Chase v. Allen* 13 Gray, 42, 45, Judge Bigelow said: "The determination of the question whether a sum named in a contract to be paid for a breach is to be regarded as a penalty or as liquidated and ascertained damages, depends not so much on the form or language of the contract as upon its subject-matter and the nature of the covenants or agreements for breach of which the damages are stipulated to be paid," citing *Hodges v. King*, 7 Met. 583. "The rule of construction applicable to such stipulations is now well settled. Where a party agrees to pay a certain sum in case he fails to perform any one of divers acts, which are of different degrees of importance and which are capable of being estimated and measured in money, the sum named as damages is to be treated as a penalty; but if the contract consists of several stipulations, the damages for a breach of which cannot be well ascertained and valued, then the parties are deemed to have intended that the sum agreed upon shall be treated as liquidated damages, from which there is to be no deduction."

Keck v. Bieber, 148 Pa. 645, decides that where a lump sum is named by the parties to a contract as compensation for loss suffered, the presumption is that the sum named is intended as a penalty and not as liquidated damages. No matter what it is called in the contract, the controlling elements are the intent of the parties and the circumstances of the case, and if the contract contains

several matters of different degrees of importance, and yet the sum named is payable for the breach of any of them, even the least, it is a penalty.

In *Long v. Towl*, 42 Mo. 545, reported in 97 Amer. Dec. at page 356, Judge Baker says:

"A sum stipulated as damages for breach of any of several covenants, is a penalty merely where the damages are readily ascertainable in the case of a breach of the contract with respect to one or more of the acts, the performance or omission of which are secured by the agreement notwithstanding it secures the performance or omission of other acts which are not measurable by any exact pecuniary standard."

To the same effect is:

Welhelm v. Eaves, 14 L. R. A., 297.

Trowel v. Elder, 77 Ill. 452.

Lansing v. Dodd, 45 N. J. L. 525.

Niver v. Rossman, 18 Barbour's Rep. 50.

Daily v. Litchfield et. al., 10 Mich. 29.

Carpenter v. Lockhart, 1 Ind. 435.

People v. Central Pacific R. R. Co., 76 Cal. 29, is a very interesting case of an action against the Central Railroad Company to recover damages for the performance of the agreement contained in an Act of Assembly of the State of California. Some of the things to be performed by the Railroad Company were ascertainable in damages and some were not. The Court decided that:

"The amount mentioned in the Act to be paid by the company upon its failure to perform any of the conditions imposed upon it by the Act, is to be treated as a penalty and not as liquidated damages."

In *City of Brunswick v. Aetna Indemnity Co.*, 68 Southern Rep. 475, where the City of Brunswick brought an action for the non-performance by the principal of certain

things specified in an ordinance of the city, the Court of Appeals of Georgia held:

"Prima facie the amount of money named in a bond conditioned for the faithful performance of the obligations of a contract is a penalty, and not liquidated damages; and a recovery in an action upon the bond will be limited to the amount of the actual damage sustained and proved.

"Where to secure the performance of the terms of a contract there is a stipulation for the payment of a fixed, unvarying sum, upon the breach of any of several promises of varying degrees of importance, especially where the damages for the breach of some of them would be easily ascertainable, the sum named will be construed to be a penalty.

"The designation of a conventional amount to be paid upon the breach of a contract will not be held to liquidate the damages, where it is apparent that it was not the intention of the parties that the obligor could escape further liability by paying that sum."

In *Charleston Fruit Co. v. Bond*, 26 Fed. 18, Judge Speer says:

"Notwithstanding the apparent conflict of authorities, it is clear that where the damages for the breach of all the stipulations of a contract are uncertain in their character and cannot be readily ascertained, the sum fixed will be regarded as the settled and agreed damages; but where some of the breaches are ascertainable and some not, as it is a penalty as to some, it is a penalty as to all."

The learned Judge also says in the same case:

"It would be manifestly at variance with the principle of just compensation where there are many stipulations in a contract, some trivial and some grave, some ascertainable in damages and some not, to hold that it was intended a large sum should be forfeited for any breach."

In *Clark v. Barnard*, 108 U. S. 436, under the peculiar wording of the bond it was held that the sum named was liquidated damages and not a penalty. But attention is called to the language of the bond in that case. The condition was as follows:

"Now therefore if said Boston, Hartford & Erie Railroad Company shall complete their said railroad before the first day of January, A. D. 1872, then the afore written obligation shall be void; otherwise to be and remain in full force and effect."

But Justice Matthews says (460):

"The security is not to be extended to any supposed damage to private interests legally affected by the process of constructing the work. All damage of this kind to private persons was carefully provided for in other parts of the act."

In the case at bar there was no other provision except in the condition of the ordinance and the condition of the bond, which was plainly written that if any private persons in the Island of Porto Rico sustained damage, for which they could sue the People of Porto Rico and recover a judgment for damages caused by the construction of the road or the electric works, that then the sureties should be liable for such amount. It is submitted that such amount was entirely susceptible of specific ascertainment. Therefore the sum named in the bond in question was a penalty and not liquidated damages.

From the very wording of the bond it is apparent that the parties had in view damages that might be sustained, and they were of such a measure as to be easily ascertainable, and having this in view the sum named in this bond was clearly intended as a penalty and not as liquidated damages.

In *East Moline v. Wier Plow Co.*, 37 C. C. App. 62, 67, the Court says:

"The case is clearly one coming within the rule long ago laid down by the English and American courts, that where the agreement secures the performance or omission of various acts, together with one or more acts, in respect to which the damages on a breach of the covenant are certain and readily ascertainable, and there is a sum stipulated as damages to be paid by each party to the other for a breach of any of the covenants, such sum is a penalty merely."

Can it be said that when these parties entered into this obligation they had in view some law of a civilized or half civilized island contrary to the decisions of all the courts and the textwriters on this subject? We submit that under all the authorities and as a matter of common knowledge, under the terms of this bond the amount fixed was not liquidated damages but a penalty.

It will be observed that the plaintiff in error in the court below claimed nothing as damages in his declaration, nor on the trial, but simply demanded its "pound of flesh" under the absurd notion that an action could be sustained upon this bond for the full sum of one hundred thousand dollars, and interest, as liquidated damages.

What would have been the result in the case of *Clark vs. Barnard*, *supra*, had the bond contained the further condition: "To pay all damages to the state or private parties sustained by reason of the construction of the road"? And how would the case have gone if it had appeared that notwithstanding the provisions of the Constitution of Rhode Island reserving to the Legislature the right to alter, amend and repeal all laws by it passed, it had passed an amendment to the act limiting the time in which the railroad could be built from one year to six months, and actually six months after the Act of the Legis-

lature was approved the Legislature had repealed the act granting the franchise to this railroad mentioned in that case? We apprehend that this Court would have ruled that the sureties on the bond were released by the action of the Legislature.

II.

The changes in the original ordinance by the amended ordinance of July 18, 1904, were material, were made without the knowledge or consent of the surety, and released it from its obligation.

To start with, this supplemental ordinance changed the route of the road as contained in the original ordinance. This appears in our statement of facts. Then it changed and limited the number of men that might be employed at any one time by the construction company; it changed and specified the time when the employees should be paid. These changes, though consequential, were not as material and prejudicial as the most important and material change, viz.: in the original ordinance the time in which the physical work of construction was to be completed was designated as three years, but by the terms of this supplemental ordinance, without the knowledge or consent of the surety, it was made optional on the part of the Executive Council of Porto Rico to cut this time down to less than two years, which was actually done, and by the terms of the repealing ordinance the time was limited to one year and ten months, and the franchise was actually repealed and cancelled fourteen months before the expiration of the three years. This, we submit, was a material change, unauthorized by any law, either in Spanish Amer-

ica or in the United States. That this change, unknown to the surety, released it from its obligation, is sustained by the best of authority, and nowhere is there any decision of any court to the contrary. It must be borne in mind that this bond was conditioned for the completion of the physical work in the construction of the railway and the electric works *within three years, and not for the performance of all the terms and stipulations in the ordinance of Porto Rico.*

Stearns on the Law of Suretyship, pp. 98 and 99, says: "Any change in the terms of the principal contract which obliges the debtor to do something which he was not before bound to do will discharge the surety or guarantor.

"(1) It is an increase of the promisor's risk or hazard. The addition of new burdens upon the principal may be the cause of his failure to perform any part of his contract. The new conditions or terms might, indirectly at least, render impossible the carrying out of the things which were the subject of the guaranty.

"(2) The contract as changed is not the same contract guaranteed by the promisor. The original contract has been put an end to and a new one substituted. The guarantor has never agreed to stand good for the latter, and suretyship cannot be imposed without the express consent of the promisor, and his execution of the original contract will not carry by implication any liability upon a substituted contract, although the latter is similar to the first.

"Either one of these reasons is a satisfactory ground upon which to rest the discharge of a promisor, and both are abundantly supported by authority. The suggestion however that a new contract has been substituted entirely supersedes the first reason given. It is of no importance to consider whether the risk of the promisor has been in-

creased or not if the promisor is to be discharged for the reason that his contract has been ended.

"If the alteration consists in relieving the principal of some obligation included in the original contract, or if new obligations have been added and liabilities equal in amount cancelled, so that the new contract imposes no greater burdens or risk than the original, or if the added obligations can be shown to be merely nominal, and which do not in any way increase the risk of the promisor, then the question of the discharge of the promisor must rest wholly upon the proposition of a substituted contract, and many courts have been willing to stand solely upon this ground."

The learned author also says, sec. 150:

"A material alteration in a contract secured by bond will release the bond. Sureties cannot be held for a default in the performance of duty, where such duty is not in terms specified, either in the undertaking itself, or by reference to the main contract, and the equities of suretyship will not permit alteration of these duties, without the consent of the surety, except upon the condition of his discharge. Such a rule is to be upheld, either upon the ground of increase of the risk to the surety, or that the contract so changed was not the one which the surety agreed to stand good for, and therefore he should be released, whether the risk has been increased or not."

In *Whitcher v. Hall*, 5 Barn & Cr. 269, it is held:

"Where H. contracted for the milking of thirty cows for a year and J. was surety, the parties to the principal contract changed the terms so that H. was to have twenty-eight cows for one part of the year and thirty-two for the other. This was apparently not a substantial change as the average of thirty remained, but the court discharged the surety, holding: The new contract was binding only on those persons who were parties to it. If it had been intended to bind J. by it, he should have been consulted; he had a right to in-

sist upon a literal performance of the original bargain. If a new bargain was made, he had a right to exercise his judgment whether he would become a party to it. There may perhaps be very little difference between the two contracts, but the question does not turn on the amount of the difference; but the question is whether the contract performed by the plaintiff is the original contract to which the defendant was a party. If it is, then J. is bound by it, otherwise he is not."

In *Woods v. Steele*, 6 Wall, 80, Mr. Justice Swayne said:

"The grounds of the discharge in such cases are obvious. The agreement is no longer the one into which the defendant entered. Its identity is changed; another is substituted without his consent; and by a party who had no authority to consent for him. There is no longer the necessary concurrence of minds."

In *Reese v. United States*, 9 Wall, 13, Mr. Justice Field said:

"Any change in the contract, on which they are sureties, made by the principal parties to it without their assent discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking."

In *United States v. Freel*, 186 U. S. 309, it is said:

"A surety on a contractor's bond conditioned for the performance of a contract to construct a dry dock is released by subsequent changes in the work made by the principal without his consent.

"The obligation of a surety does not extend beyond the terms of his undertaking, and when this undertak-

ing is to secure the performance of an existing contract if any change is made in the requirements of such contract in matters of substance without his consent, his liability is extinguished."

In *Mundy v. Stevens*, 61 Fed. Rep. 77, it was decided as follows:

"In an action against sureties on a bond given to secure performance of a contract the defense of material alterations in the contract operating to release the sureties may be made under the plea of the general issue and without previous notice."

And further:

"A surety who defends on the ground of an alteration in contract operating to release him has not the burden of showing that such alteration was without his consent when the plaintiff himself sets out the alteration in his statement of claim and introduces it in evidence."

This latter was precisely what was done by the plaintiff in the court below.

In *Zeigler v. Hallahan*, 66 C. C. A. 1, it was decided:

"Where defendant became surety for the performance by a tenant of the covenants of a lease for ten years which bound the tenant to keep and pay rent for the premises and at the expiration of the term to deliver them in good condition a modification of the contract before the tenant took possession, without the knowledge or consent of defendant, by the insertion of a provision that in the event of the total or partial destruction of the premises by fire or other casualty rendering the same untenable, the lease from such time should become void and should be surrendered to the lessor, constituted a material alteration which operated to discharge defendant from liability. In determining whether a surety is discharged by an alteration of the principal contract without his consent the question is not whether the change was

or could be prejudicial to him, but whether it effected a material alteration of the agreement to which his undertaking of suretyship related; and if it did, he is discharged, even though the change may have been beneficial to him. The rule as to the discharge of a surety by an alteration of the principal contract without his consent is not affected by the fact that his undertaking recites that was made by him for a valuable consideration."

In *United States v. McIntyre*, 111 Fed., 590, it is said:

"Any change in a contract for the performance of which the surety is bound, made without his assent, will operate to relieve him from liability, and where a change has been made in such contract, the burden rests upon the ones seeking to charge the surety to prove that he knew of and assented to such change."

To the same effect is the law as declared by the highest courts of the states.

In *Bethune v. Dozier*, 10 Ga. 235, it is said:

"No principle of law is better settled at this day than that the undertaking of a surety being *stricti juris*, he cannot either at law or in equity be bound farther or otherwise than he is by the very terms of his contract. * * * He is not bound by the old contract for that has been abrogated by the new; neither is he bound by the new contract, because he is no party to it. * * * Neither is it of any consequence that the alteration in the contract is trivial, or that it is for the advantage of the surety. *Non haec in foedera veni* is an answer in the mouth of the surety from which the obligee can never extricate his case, however innocently or by whatever kind intention to all parties he may have been actuated."

In *Rowan v. Sharps Co.*, 33 Conn. 1, the syllabus is as follows:

"The original contract between R. and L. and F. H. & Co. provided that the rifles should be made with

all possible dispatch. Before the contract was performed a supplemental contract was entered into by the parties by which it was agreed that 300 rifles per week should be delivered for a certain period and 600 per week afterwards. *Held*, that this was such a change of the contract as to discharge the surety. Even if the delivery of the number of rifles per week agreed upon in the supplemental contract would have been a reasonable delivery, yet a specified number or fixed time varies from a reasonable but uncertain number or time.

"The original contract provided that F. H. & Co. might retain \$4.00 from the price of each rifle for a payment of advances then made. The supplemental contract provided for the advancement of an additional sum and for its repayment with the other advances by an increased reduction from the cash paid for each rifle. *Held*, that this was such a change as to discharge the surety."

In *Village of Chester v. Leonard*, 68 Conn., 495, it is said:

"A clause in the contract in question provided that cash payments made before the completion of the work should in no way affect or alter the conditions of the contract.

"*Held*, that this referred to the continued liability of the contractor for the character of his work, but did not justify as against the sureties material variations in the mode of payment which tended to diminish the fund to be reserved till the final acceptance of the work for the purpose of securing its said execution.

"A surety is not bound to be on the watch for variations which may be made in the obligations of his principal; nor can his liability be enlarged by actual notice thereof without his acquiescence or consent."

In the case of *Fidelity & Deposit Co., of Maryland, v. United States*, 70 C. C. A. 204, the United States, through

its authorized agents, shortened the time in which the principal contract was to be performed by an agreement between the contractor and the Government. Judge Wallace in delivering the opinion of the Circuit Court of Appeals for the 2nd Circuit, said: "This interruption shortening to nine months the term for performing an undertaking which by the contract was to be performed within twelve months, affected a substantial deviation in the contract which the surety guaranteed; and the rule is familiar that any material alteration or deviation from the terms of a contract for the performance of which a surety is bound, made by the parties without his consent, will release him from his obligation."

The same rule applies whether the obligation of the surety is to the United States, a state, a dependency or a municipality.

United States v. Freel, supra.

City of Brunswick v. Aetna Indemnity Co., supra.

Where the State steps in and changes the conditions without the assent of the sureties, they are discharged.

In *Stearns on Suretyship*, Sec. 171, it is said:

"The limit as to time is as important to sureties upon official bonds as the limit in amount, and the Legislature cannot exchange either stipulation in the surety's contract without his consent."

Again the learned author says at page 121:

"No good reason is apparent why any different rule should apply in cases where the State is a party than in cases of suretyship between individuals."

The last clause of Section 30 of the original ordinance (Record, page 34), viz.: "The rights, privileges and concessions herein granted shall be subject to amendment,

alteration or repeal by the Executive Council" it is claimed gave the People of Porto Rico the right to change the entire character and conditions of the bond upon which this suit is founded; that it gave them the right to make all the minor changes hereinbefore specified and the further right to cut down the period of three years as they did to one year and ten months.

In considering this clause, it will be observed that when the bond was given in this case the right to amend, alter or repeal was vested by the clause exclusively in the Executive Council. That the Executive Council had no such authority is apparent from the fact that in the amended ordinance of July 7, 1904, this clause was amended and the following added to it:

"With the approval of the Governor of Porto Rico and the President of the United States. And such amendment, alteration or repeal shall also be subject to the power of Congress to annul or modify the same."

Therefore we say that when this bond was given, the insertion of the right to amend, alter or repeal contained in the last clause of Section 30 was of no force or effect.

Suppose, however, the clause had been approved by the Governor of Porto Rico and the President of the United States. Can it be said that one day after this bond was given the People of Porto Rico could repeal the same and hold the defendant in error for the full sum of \$100,000 with interest, as claimed in the declaration? Can it be said that under this clause so great a change in matter of substance as diminishing the time in which the original obligation stipulates that the principal shall do certain physical construction from three years to one year and ten months can be made without the consent of the surety? The very statement of the proposition answers it in the negative.

United States v. Freel, 92 Fed. 299, decides that: Where the release of a contractor's surety from the obligation of a building contract on account of subsequent changes therein without his consent is involved, the true meaning and intent of the contract should be ascertained according to the usual rules of construction; but when the expressed intention of the parties has been determined, the obligation of the surety is *strictissimi juris*, from which he is discharged by any alteration of the terms of the contract, whether the same be harmful or beneficial to him. Where the contract authorizes the parties to enter into auxiliary contracts for alterations of the work from that shown in the plans and specifications without invalidating the primary contract, the parties may stipulate without releasing the surety for such enlargement or extension of the work as in nature, magnitude and expense would be consistent with and bear a reasonable and subsidiary relation to the work first undertaken. Under such a provision the alteration of the plans and specifications of a contract for the construction of a dry dock for the United States, in consideration of \$612,000 so that its length should be 670 rather than 600 feet, with an increased payment of \$45,566 and an extension of the time of performance for three months, was within the contemplation of the parties and sureties to the original contract and the latter were not released thereby. But a supplemental contract changing the location of the entire dock from the water side as provided in the initial contract to a location 64 feet inland, and requiring the contractor to make all necessary excavations and connections with the water, at an increased payment of \$5,063.18, and with an increased time for performance, released the sureties, inasmuch as all consent of the sureties anticipating changes in the contract related to alterations in the attached plans and specifications, of which the location of the structure was no part. This

case first went to the Circuit Court of Appeals, 2d Circuit. As to the extension of 70 feet in the original contract, Judge Wallace said (99 Fed. 239) :

"Whether the clause warrants such a latitudinarian construction as to embrace the substantial departure from the plans and specifications provided for by the first supplemental contract, we do not determine. We are clear that it does not warrant the change made by the last supplemental contract, and that being so, whether the first change was authorized is a question which does not require decision."

The case was appealed to this Court and the judgment affirmed. U. S. v. Freel, 186 U. S. 309.

We have said that this bond was conditioned for the performance of the physical construction of the railway and electric works within three years. Whatever the effect of the reservation of the right "to amend, alter or repeal the rights, privileges and concessions" granted by the ordinance upon the Vandegrift Construction Company; the parties here fixed in no uncertain terms in the bond just what alterations might be made without releasing the sureties, and by so doing they excluded the right to make any other alterations without releasing the sureties. They provided in the body of the bond as follows (Record, pages 40, 41) : "Provided, however, and upon the following express conditions :

"1st. That no extension of the time or times limited in said ordinance for the completion of the work therein authorized, or any part thereof, whether granted with or without the knowledge and consent of the sureties, shall in any way discharge the sureties from liability upon this bond."

This is the only provision in the bond as to any changes, alterations or repeals, and the parties distinctly stipulated that the

extension of time contained in the proviso was the only material alteration that could be made without the consent of the sureties, and construing the ordinance in connection with the Bond as affecting the surety, can it be said that there was any right on the part of the authorities of Porto Rico, after having stipulated that if the physical work contemplated in the ordinance should be completed within three years the obligation should be void, to arbitrarily and without notice to the sureties limit the time of three years specified in the Bond to one year and ten months, thus cutting off fourteen full months from the time in which the original parties had the right to finish the work?

If the clause in question had any validity when the bond was executed, it cannot be so interpreted as to destroy the rights of the defendant in error before there was any breach of the conditions in the bond as clearly and plainly expressed. The changes and alterations, if authorized, could not be interpreted to mean the entire destruction of the rights of the defendant in error to see performed that which it covenanted to see performed in three years, should be limited to less than two years without its knowledge or consent. Such a construction would be absurd and ridiculous and could not be sustained on any principle or rule of law governing the interpretation of contracts.

III.

The absolute repeal of the ordinance fourteen months before the expiration of the three years specified in the Bond, made it impossible to complete the work and released the defendant-in-error from all obligation under the bond in suit.

It is claimed by the plaintiff-in-error that it had the right to repeal this ordinance without affecting the rights of the sureties, and fourteen months before the expiration of the time limited in the bond it was repealed (Record, page 56 *et seq.*). It is further claimed that the right of this action was preserved notwithstanding the repeal of the franchise to the Construction Co. because in Sec. 2d it was attempted to forfeit the bond "to whatsoever extent the same shall be liable under the law."

Plaintiff-in-error made no claim for any legal damages sustained by the survey of the route and by grading the roadbed and purchase of right of way and entering upon the lands for the construction of the roadbed, or any other damages up to that time. Under the pleadings and evidence in this case that question does not arise, as no damages are claimed in the declaration filed, and there is no evidence of any damage contained in the record. Our contention is that the repealing ordinance excluded the Vandegrift Construction Company from any further right to complete the physical construction provided for in the bond and absolutely precluded the right of the defendant in error to do and complete the work within the time limited that the Vandegrift Construction Company had undertaken to do and complete.

To state the case plainly, the defendant-in-error entered into the bond conditioned for the physical completion of a

certain railway and electric works within three years, and fourteen months before the expiration of the three years they became aware of the fact that all right of completion had, without their knowledge or consent, been taken away, cancelled and rendered null and void by the absolute repeal of the ordinance mentioned in the bond. We submit that this action on the part of the People of Porto Rico put an end to the undertaking of the defendant-in-error when the ordinance was repealed and rendered it impossible to complete the work at the time specified in the ordinance. This, we submit, released the defendant-in-error from all obligation under the bond.

This bond, forfeited to the People of Porto Rico, gave them no right to maintain an action upon it, as the repealing ordinance drove the Vandegrift Construction Company from the Island of Porto Rico and cut up by the roots all right on its part, with the aid of its sureties, to complete the work within the time mentioned in the bond. *In other words, more than one year before there was any breach in the condition of the bond it was cancelled by the action of the plaintiff-in-error.* As to the effect of this repealing ordinance upon the rights of the defendant-in-error, we cite *Ex Parte McCardle*, 7 Wall, 514, where it is said:

"On the other hand, the general rule, supported by the best elementary writers, is, that 'when an act of the legislature is repealed, it must be considered, except as to transactions past and closed as if it never existed.' And the effect of repealing acts upon suits under acts repealed, has been determined by the adjudications of this court. The subject was fully considered in *Norris v. Crocker* and more recently in *Insurance Company v. Ritchie*. In both of these cases it was held that no judgment could be rendered in a suit after the repeal of the act under which it was brought and prosecuted."

The effect of the repeal of the statute is to obliterate the statute repealed as completely from the records as if it had never passed, and it must be considered as a law that never existed except for the purposes of those actions or suits which were commenced, prosecuted and concluded while it was an existing law.

In support of this rule, we cite

Thorne v. San Francisco, 4 Cal. 165.

Van Inwagen v. Chicago, 61 Ill. 31.

Musgrove v. R. R. Co., 50 Miss. 677.

Town of Belvidere v. Warren R. R. Co., 34 N. J. L. 193.

It is also decided that pending judicial proceedings based upon a statute cannot proceed after its repeal:

Gilleland v. Skiler, 9 Kan. 569.

McMinn v. Bliss, 31 Cal. 122.

State v. Dale, 29 Conn. 272.

It is also decided that the same rule holds true until the proceedings have reached the final judgment in the court of last resort, for those courts, when they come to pronounce their decisions, conform them to the law then existing, and may, therefor, reverse a judgment which was correct when pronounced in the subordinate tribunal whence the appeal was taken if it appears that since the appeal was taken a statute on which the judgment was given has been withdrawn by an absolute repeal.

In support of this rule we cite

Hartung v. Bell, 22 N. Y. 95.

Hubbard v. State, 2 Tex., App. 506.

Attell v. Grant, 11 Md. 104.

Mayor of Annapolis v. Maryland, 3 Md. 112.

As said by Buffington, J., in the Circuit Court of Appeals (Record, page 260): "Can the obligee who has without the knowledge or consent of the surety repealed the franchise still hold the surety in damages for the non-completion of a railway which possession of the franchise alone enabled the principal to lawfully build?" We think the statement of the question is its own answer. This bond was given for the performance of work which could only be done under the franchise. The continuance of the franchise by the plaintiff was therefore an implied prerequisite to its calling on the surety to perform. To hold otherwise would be to say that if the obligee a year, a month or a day after the franchise was granted, repealed it, it could still hold the surety to build the disfranchised road. It would, in effect, be demanding bricks without furnishing straw, be contrary to the common sense of right and wholly at variance with the uniform holdings of Courts."

IV.

The Bond in suit was executed, acknowledged and delivered by the Surety Company in Pennsylvania, is a Pennsylvania contract and is governed by the laws of the United States.

The defendant-in-error is, and was at the time this bond was executed and delivered, a corporation of the State of Pennsylvania with its principal office in the City of Scranton in that State.

On May 23, 1903, it executed as one of the sureties thereon the bond in question in the sum of \$100,000, conditioned for the physical construction of a railway and

electric plant in the Island of Porto Rico within three years. The bond was delivered to the Vandegrift Construction Company the same day in the City of Philadelphia. No place of payment (in case of forfeiture) was designated in the bond or otherwise. Therefore it is elementary law that it was payable in the City of Scranton, in the Commonwealth of Pennsylvania, in the absence of any designation of any other place of payment. When this bond was executed and delivered in Pennsylvania, it then and there became a fully executed and subsisting obligation as against the defendant-in-error, and the fact that the ordinance specified that the bond was to be "satisfactory in form to the Attorney General and as to sufficiency to the Treasurer," did not change its character as a completed obligation, and had it never been approved by the Attorney General and Treasurer of Porto Rico, that fact would be no defense on the part of the defendant-in-error to an action on the bond. The bond, being a completed obligation when made and delivered in the United States was and is governed by the laws thereof, and the fact that it was afterwards received and filed in the proper office in Porto Rico did not change its character and did not subject it to the laws of Porto Rico or the laws of Spanish America as to its interpretation.

In England and many of the States of the Union it is said that the law governing the contract is derived from the intention of the parties at the time of its making. In "*The Law of England*," by the Earl of Halsbury, Vol. 238, Sec. 356, it is said: "The essential validity of a contract, as well as its interpretation and effect and the rights and obligations of the parties to it, are governed (with certain exceptions) by the law which the parties have agreed or intended shall govern it, or which they may be presumed to have intended. This law is generally known as the proper law of a contract."

This English rule is supported by many cases cited by the learned author, but by an inspection of the same it is found that the English Judges in most of the cases determine that the parties intended that the contract should be governed by the laws of England. It also appears that Connecticut, the District of Columbia, Illinois, Nebraska, New York, North Carolina, North Dakota, South Dakota, Texas, Virginia, Washington and Wisconsin have adopted the English rule above cited: See *Harvard Law Review*, Vol. 23, p. 207.

Let it be granted that this is the true rule of interpretation as to what law governs, what facts does this record contain showing the intention of the parties as to what law should govern the construction of this bond? It was provided in the bond specifically that any extension of time, whether with or without the knowledge of the surety, should not discharge its obligation. The plaintiff in error in its position is without any proof to show that the parties intended that the law of Porto Rico should govern this contract. By the contract we mean the bond. By Par. 2 of Section 353 of the Political Code of Porto Rico, found on page 432 of the Revised Statutes and Codes of Porto Rico of 1902, it is thus provided:

(Par. 2.—) "It shall be unlawful for any corporation, joint stock or limited liability company or association not incorporated under the laws of Porto Rico to do business therein until such corporation, company or association shall have secured from the Treasurer of Porto Rico formal license to transact business therein; and no such license shall be issued by said Treasurer until such corporation, company or association shall have paid the license fee herein-after specified and shall have deposited with the Treasurer a certificate under seal from the Secretary of Porto Rico showing that it has filed in the office of

the Secretary an authenticated copy of its charter and the statement and certificate of consent required by law."

In Section 355, Par. 1, of the Political Code of Porto Rico, found on page 435 of the Revised Statutes and Codes of Porto Rico of 1902, is found the following:

(Par. 1.—) "Every surety, insurance or building and loan company not incorporated under the laws of Porto Rico but doing business therein shall pay as a franchise tax, in addition to the regular insular and other taxes upon their real and personal property and such special stamp taxes as are hereinafter provided, an annual tax of three per centum upon the gross amount of all premiums or dues collected in Porto Rico, to be paid semi-annually at the time of rendering the semi-annual statement herein required."

In Par. 2 on page 436, it is also provided:

(Par. 2.—) "Every surety, insurance or building and loan company doing business in Porto Rico shall pay the following special stamp taxes by the affixture of internal revenue stamps under such regulations as may hereafter be prescribed by the Treasurer: for each bond or obligation of the nature of indemnity for loss, damage or liability; and each bond, undertaking or recognizance conditioned for the performance of the duties of any office or position issued or executed or renewed by any surety company on the amount of premium charged one-half of one per cent. on each one dollar or fractional part thereof."

By Par. 3 of the Section, found on page 436, it is also provided as follows:

(Par. 3.—) "Any agent, officer or representative violating any of the provisions of this section shall be guilty of misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than two hundred nor more than five hundred dollars."

By the Civil Code, found on page 780 of the Revised Statutes and Codes of Porto Rico of 1902, in Section 65 appears the following:

"All corporations or joint stock companies organized under the laws of any state or of the United States or of any foreign government shall, before doing business within this Island, file in the office of the Secretary a duly authenticated copy of their charters or articles of incorporation, and also a statement ratified by the oath of the President and Secretary of said corporation and attested by a majority of its board of directors, showing: 1.—The name of such corporation, the location of its principal office or place of business without this Island; and if it is to have any place of business or principal office within this island, the location thereof. 2.—The amount of its capital stock. 3.—The amount of its capital stock actually paid in money. 4.—The amount of its capital stock paid in any other way and in what. 5.—The amount of the assets of the corporation and of what the assets consist, with the actual cash value thereof. 6.—The liabilities of such corporation, and, if any, of its indebtedness, how secured and upon what property."

Section 66, found on page 781, provided as follows:

(Section 66.—) "Such corporation or joint stock company shall also file at the same time and in the same office a certificate under the seal of the corporation and the signature of its President, Vice-President or other acting head, and its Secretary if there be one, certifying that the said corporation has consented to be sued in the courts of this Island upon all causes of action arising against it in this Island, and that service of process may be made against some person, a resident of this Island, whose name and place of residence shall be designated in such certificate, and such service when so made upon such agent shall be valid service on the corporation or company, and such agent shall reside in the principal place of business of such corporation or company."

Section 67, on the same page, provides that the person appointed as attorney for service shall file his acceptance of his appointment in the same office.

Section 68, found on page 782, provides as follows:

(Section 68.—) "If any foreign corporation shall attempt or commence to do business in this Island without having first filed said statements, certificates and consents required by this Code, it shall forfeit to the People of this Island the sum of ten dollars for every day it shall so neglect to file the same."

This record does not show that any of the provisions above quoted were complied with on the part of the defendant-in-error. In fact, they were not complied with except as to the appointment of an attorney for service, who refused to accept the appointment, thus showing conclusively that the People of Porto Rico did not consider that the bond in question was to be governed in any way by the laws of Porto Rico, for the reason that, if such intention had existed, this record would show that the defendant-in-error complied with the conditions of the laws of Porto Rico in order to entitle the plaintiff-in-error to contend that it was the intention of the parties connected with the transaction that the laws of Porto Rico should govern. Further, when the provision was inserted in the bond that no extension of time, known or unknown to the sureties, should release them, the parties had in view the general law of the United States discharging the sureties whenever such extension of time was granted without the consent of the sureties, and not an obscure provision of a Code in a dependency of the United States. The bond in question shows upon its face that no revenue stamp as provided by the laws of Porto Rico was required by these parties, showing distinctly and conclusively that it was in the minds of all the parties that this bond should be governed by the general laws of the United States. No license was

required; no stamp was required; no certificate showing the condition of the company was required. In fact, every provision of the ordinances of Porto Rico relative to the doing of business by foreign corporations was disregarded.

It will not do for the plaintiff-in-error to say that all these requirements of the law of Porto Rico were unnecessary for the reason that the making of this bond in Pennsylvania and the filing the same with the People of Porto Rico was not doing business in Porto Rico. If it was not doing business in Porto Rico, of course the laws of Porto Rico have no application.

The learned Judge on the trial of this case, in his oral opinion granting the non-suit, used the following language (see Record, pp. 232 and 233): "It is true in this case that the undertaking here was with the People of Porto Rico, a municipality on a distant island, and also that there was to be an approval of this bond there. That is a circumstance that is not to be lost sight of, but it seems to me that it is not controlling. The approval of the bond was merely a signification by the proper officers that the bond was acceptable to them in form and substance, the sureties were accepted. But that didn't alter the circumstance that the surety had already become obligated. The surety could not withdraw from that once having signed and sealed it and parted with it. It wasn't as though this surety was making a commercial proposition, as we might say, by letter or in any other form, which was only to become binding upon it in case it received the acceptance and approval of the party to whom it was addressed. This was a perfect obligation when it left the hands of the corporation, and the act of the officials in Porto Rico was merely an indication, a formal indication called for by the franchise ordinance, that they were satisfied with the responsibility of the surety and with the character of the bond as it read, that it complied sufficiently with the ordi-

nance to warrant their approval. All these things, and possibly others that might be suggested, it seems to me, are controlling in this case, and determine that the place of solution of this bond, of this contract, is here, the payment to be made here, and that, therefore, the law here is the law which in entering into the bond it must be assumed that both parties understood was to govern the People of Porto Rico as well as the people, the sureties here. In going abroad, if you please, to get security for this work or putting it a little more favorably to the plaintiff, the People of Porto Rico, in accepting as a surety on the bond of the Vandegrift Construction Company, a corporation of another country, the People of Porto Rico must be assumed to have been satisfied to accept liability upon that bond in accordance with the ordinary rule which is to prevail, that the place of solution, the place of performance by that particular obligation, was to be the guiding law in determining the responsibility. If I am correct in this view and that the law of this country rather than the law of Porto Rico governs the liability upon this bond, then it follows naturally that the plaintiff has made out no case."

The learned trial judge was thus within the rule of *Hall v. Cordell*, 142 U. S. 116, and other kindred cases. He was also within the rule laid down in *Wharton on Conflict of Laws*, 3rd Ed., Sec. 394, where it is said by the learned author: "Now when the obligor resides in a different state from the obligee, the seat of the obligation, so far as concerns the obligee's rights to assign it, or his duties in respect to its taxation, is his domicile. On the other hand, the seat of the obligation, so far as concerns the obligor is his domicile, whenever his domicile is the place of payment, and in many cases the obligation is presumed to be undertaken at his domicile, in which case the law of

that domicile determines the way in which the obligation is to be construed."

Again the same learned author says, at Section 410:

"Where a person assumes an obligation at his own domicile, when there is no place of performance indicated, the law of that domicile controls the contract so far as concerns the mode of its performance."

And in the same section the author illustrates as follows:

"A., in Philadelphia, makes a promissory note in which no place of payment is specified and which is therefore payable in Philadelphia."

In the present case the debtor is a corporation. It is authorized to transact business in a certain locality. It has a situs, a fixed domicile. Its principal office is located in the City of Scranton, Pennsylvania. Its property and assets are there situated. It is there that it does its business. It contracts only through its home office or through agencies established at other points. It assumes its obligations at its home office and there contracts to make payments on obligations calling for the payment of money. As stated, its property and assets are there situated and it is only there that payment can be enforced. Therefore, is it not clear that the governing law is the law of the debtor's domicile? The obligation was to pay a certain amount of money on the failure of the Vandegrift Construction Company to complete in a certain time, to wit, in three years, the physical construction of a railway and electric works. The defendant in error promised to pay a certain sum of money on the failure so to do. No place is specified where such payment should be made, and it is elementary law that under such circumstances the place of payment is at the domicile of the obligor.

In *Scudder v. Union Bank*, 91 U. S. 406, Mr. Justice Hunt in delivering the opinion of the Supreme Court, said:

"Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought."

The opinion of the court in this case was rendered in 1875. It has never been overruled, nor has it been shaken.

In *Call v. Palmer*, 116 U. S. 100, Mr. Justice Woods said, in delivering the opinion of the court:

"The note which is the basis of this suit was made in Iowa, and the contract must be governed by the laws of Iowa." Citing *De Wolf v. Johnson*, 10 Wheat, 367; *Scudder v. Union National Bank*, 91 U. S. 406.

In *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 453, Mr. Justice Gray said:

"This court has not heretofore had occasion to consider by what law contracts like those now before us should be expounded. But it has often affirmed and acted on the general rule, that contracts are to be governed as to their nature, their validity and their interpretation, by the law of the place where they were made, unless the contracting parties clearly appear to have had some other law in view."

In *United States Mortgage Co v. Sperry*, 138 U. S. 336, Mr. Justice Harlan said: "The legal rate referred to in the appellant's charter is the rate established by the law of the place where the contract of loan is made. This view is supported by those decisions in New York which hold, in respect to loans made in other States, that the rate

of interest, allowed by the State where the contract of loan is made, will be respected by the courts of New York, although such rate is in excess of that fixed by its own laws, and although, in some of the cases, one of the parties to the contract, the lender, was a resident of that State."

In *Trust Co. v. Krumseig*, 172 U. S. 351, Mr. Justice Shiras said:

"Usury is a statutory offence, and Federal courts in dealing with such a question must look to the laws of the State where the transaction took place, and follow the construction put upon such laws by the state courts."

And at page 355 the learned Justice says:

"Usury is, of course, merely a statutory offense, and Federal courts, in dealing with such a question, must look to the laws of the State where the transaction took place and follow the construction put upon such laws by the state courts."

In *Carnegie v. Morrison*, 43 Mass. 381, nearly seventy years ago Chief Justice Shaw of the Supreme Judicial Court of Massachusetts, laid down the rule which governs the interpretation of the contract in the case at bar. The facts were as follows:

"O., the agent in Boston of M. & Co., bankers in London, gave B., of Boston this letter addressed to them: 'Mr. J. B. having requested that a credit may be opened with you for his account in favor of C. & Co. of Gottenburg for 3,000 pounds, I have assured him that the same will be accorded by you on the usual terms and conditions.' B. transmitted this letter to C. & Co. at Gottenburg, to whom he was indebted, and requested them to value at ninety days sight (the usual time of drawing upon London from Gottenburg) and pass the same to his credit. C. & Co. drew a bill on M. & Co. accordingly, which they refused to accept or pay. Held, that the contract of M. & Co. was gov-

erned by the laws of Massachusetts and that by this law C. & Co. might maintain an action in their own name against M. & Co. for breach of contract."

In the opinion on page 400, the Chief Justice says:

"Upon these facts the court are of opinion that the construction, the obligation, the legal effect and operation of this transaction are to be governed by the laws of Massachusetts. So far as this transaction constituted a legal and binding contract at all, it was, we think, by force of the law of place of contract, operating upon the act of the parties, and giving it force as such. The undertaking, it is true, was to do certain acts in England to wit, to accept and pay the plaintiff's bills; but the obligation to do those acts was created here, by force of the law of this state, giving force and effect to the undertaking of the defendants' agent, and make it a contract binding on them. Supposing the law of England had provided that no letter of credit should be issued, unless under seal, or stamp, or attested by two witnesses, or acknowledged before a notary; is it not clear, that as no such formalities are required by our laws, a letter of credit, made here, would be held good, without such formalities? We think it would be so held even in England, under the authority of the general rule, that a contract, valid and binding at the place where made, is binding everywhere."

The bond in question was made in the United States and in Pennsylvania and was there, so far as the defendant-in-error is concerned, delivered; and the obligation of the bond was created there. It then and there became a binding obligation upon the defendant-in-error. The fact, therefore, that it was to be satisfactory in form and sufficiency to the Attorney General and Treasurer of Porto Rico and was there filed, change the fact that the bond was made in and governed by the laws of the United States. We call attention to the very able article on the subject of "What Law Governs Validity of a Contract" by Prof. Joseph H.

Beale, of the Harvard Law School, found on page 272 of Vol. 23, Harvard Law Review, wherein the learned Professor reviews the whole question and concludes as follows:

"It thus appears that the principle which is both sound theoretically and most practical in operation is the principle that contracts are in every case governed as to their nature and validity by the law of the place where they are made."

V.

If the Bond be regarded as a Porto Rican contract, we say (1) no obligation should be held to exist unless expressly stated in the bond; (2) the guaranty should not be extended beyond the limits expressly mentioned in the bond; (3) the obligation of the Surety Company was cancelled and ended by the action of the authorities of Porto Rico.

The Common Law and the Civil Law have distinct origins and often times proceed upon wholly different theories. It happens, however, that in their ultimate analysis these two systems of law are often found to be in accord. In the present case, they agree completely upon the fundamental principles which determine this controversy.

The bond upon which suit has been brought established certain contractual relations between the parties. The purpose of this suit is to determine what those relations were and to ascertain how far, if at all, they were subsequently modified. If the bond be regarded as a Porto Rican con-

tract, the questions which naturally suggest themselves are three, to wit:

1. What rules of interpretation do the laws of Porto Rico prescribe for instruments of this character?

2. Viewed in the light of such rules, what obligations did the defendant in error assume under the bond in question?

3. Were such obligations subsequently modified or cancelled?

These questions will be considered in the order stated.

FIRST—What Rules of Interpretation do the Laws of Porto Rico prescribe for Instruments of this Character?

We quote the following Articles of the Civil Code of Porto Rico:

"Art. 1022.—Los contratantes pueden establecer los pactos, clausulas y condiciones que tengan por conveniente, siempre que no sean contrarios a las leyes, a la moral ni al orden publico."

"Art. 1058.—Las obligaciones que nacen de los contratos tienen fuerza de ley entre las partes contratantes, y deben cumplirse al tenor de los mismos."

"Art 1728.—La fianza no se presume: debe ser expresa y no puede extender a mas de lo contenido en ella."

"Art. 1248.—Si los terminos de un contrato son claros y no dejan duda sobre la intencion de los contratantes, se estrara al sentido literal de sus clausulas."

The Spanish text is printed without vowel accents.

The official published translation of these Articles is not altogether satisfactory, and we submit the following, instead:

"Art. 1022.—Persons may make such contracts,

agreements and stipulations as they may deem proper, provided these shall not be contrary to law, to morals or to public order."

"Art. 1058.—Obligations arising out of contracts shall have the force of law as between the contracting parties and shall be observed according to their terms."

"Art. 1728.—A guaranty is not to be presumed; it must be express and cannot be extended to include more than actually stipulated."

"Art. 1248.—If the terms of a contract be clear and leave no room for doubt as to the intention of the contracting parties, it stipulations shall be literally adhered to."

The above Articles disclose two principles which may be said to be fundamental, namely, great freedom in the making of contracts, and great strictness in their interpretation.

The Articles quoted were taken bodily from the Civil Code of Spain; and hence the following Spanish authorities are in point:

In a recent work on the Spanish Civil Code, by Don Jose Maria Manresa y Navarro, that distinguished commentator, referring to Article 1281 of the Spanish Code, which corresponds with Article 1248 of the Porto Rican Code above quoted, says:

"En principio, la ley coloca la intencion de los contrayentes, que es el alma del contrato, sobre las palabras, que son el cuerpo en que aquella se encierra; y tan es asi que, cuando se atiende al sentido literal, es porque, siendo los terminos claros, se supone que en ellos esta la voluntad de los contratantes; en suma, valen las palabras, no por si, por lo que dicen. Pero la prevencion contra el litigio, el temor de que lo hasta entonces claro quede oscurecido y el de que lo cierto, las palabras inequivocas, se cambien por lo dudoso, hace que el sentido literal de los terminos tenga una

influencia extraordinaria, impidiendo, cuando aquellos son claros, que se planteen problemas difíciles en averiguación del propósito de los contratantes." (Vol. VIII, p. 704.)

"In principle, the law, in order to ascertain the intention of the contracting parties, which is the soul of the contract, looks to the words, which constitute the body in which that soul is enclosed. The literal sense of the words is adhered to because, where such words are clear, they are assumed to express the will of the contracting parties. To sum up, the words are important, not in themselves, but because of what they express. The extraordinary influence thus exerted by the literal sense of the words flows from the desire to avoid litigation, from the fear that what has been clear may become involved in doubt, and that what has been certain in the shape of unequivocal expressions may be superseded by what is doubtful. When expressions are clear, it is thus possible to avoid those difficult questions which involve an investigation into the intentions of the contracting parties."

Referring to Article 1827 of the Spanish Civil Code, which is the same as Article 1728 of the Porto Rican Code above quoted, the same authority says:

(Translation.)

"Tenemos indicado anteriormente que la fianza es de interpretacion estricta o restringida. Este es un principio tradicional en casi todas las legislaciones, el cual esta fundado en la misma naturaleza de esta especial convencion. Por eso no quede pasar de los limites en que ha sido contraida, que es lo que ha querido decir nuestroCodigo, de acuerdo con el Artículo 2015 del frances, al exponer preceptivamente que la fianza no quede extenderse a mas de lo contenido

en ella. Es decir que, cuando es definida o al prestarle se constituya por una suma o *por una obligacion determinada, la fianza no asegura mas que aquella suma o aquella obligacion especial que le sirve de objeto* o por la que se prestara. Esto es lo mismo que vino a establecer el Codigo Civil austriaco en su Articulo 1353 al pereceptuar que "la fianza no podra extenderse a mas de lo que expresamente haya declarado el fiador". En esa doctrina estan conformes casi todas las legislaciones, viniendo a constituir un principio tradicional en el derecho, como decio Troplong." (Vol. XII, p. 233.)

(Translation.)

"We have already pointed out that a guaranty must be interpreted in a strict or restricted sense. This is a traditional principle to be found in nearly all systems of legislation, a principle which has its foundation in the very nature of this particular kind of contract. For this reason a guaranty cannot go beyond the limits which the contract itself expresses. This is what our Code means, and in this it is in accord with Article 2015 of the French Code, which also lays down the rule that a guaranty shall not include anything which is not actually expressed in the instrument itself. In other words, when the guaranty is defined or when at the time that it is given it is for a definite sum or *for a definite obligation, that guaranty does not cover more than the sum or anything beyond the particular obligation which it was its purpose to secure.* This is the same provision which is contained in Article 1353 of the Austrian Civil Code, which provides that 'the guaranty shall not extend beyond what the guarantor has expressly declared.' Nearly all systems of legislation are in accord in this matter, and the principle thus expressed is traditional, as stated by Troplong."

The Supreme Court of Spain ("Tribunal Supremo de Espana"), in the case of *Canti v. Ibarra*, decided on No-

vember 16, 1900, explains the reason for the above statutory provision, in the following language:

"Por lo mismo que la fianza es una obligacion especial que no se presume, es preciso que consten las que contrae el fiador o los limites de la fianza. * * *

"Siendo gratuito el contrato de fianza, habria de interpretarse, cuando ofreciera duda, por la menor transmision de derechos." ("Jurisprudencia Civil," Vol. XC, pp. 656 and 660.)

(Translation.)

"The fact that a guaranty is an obligation which cannot be presumed requires that, when it is given, the thing guaranteed and the limits of the guaranty shall be expressly set forth. * * *

"When the contract of guaranty is gratuitous, it should, in case of doubt, be interpreted in the sense of creating the least possible rights."

To the same effect is the case of *Fernandez v. Gomez*, decided by the Supreme Court of Spain on May 29, 1897. ("Jurisprudencia Civil," Vol. LXXXI, p. 1025.)

Applying the above rules of interpretation to the present case, it is clear that the bond upon which suit has been brought should be strictly and literally construed; that no obligation should be held to exist unless it is expressly stated in said bond; that the guaranty should not be extended beyond the limits expressly mentioned; and that if there should be any doubt as to the literal meaning of the words—which fortunately there is not—that doubt should be resolved in favor of the guarantor.

Having thus ascertained the rules of interpretation applicable to the case, let us pass to the next question.

Second.—Viewed in the Light of the Above Rules, What Obligations Did the Defendant-in-Error Assume Under the Bond in Question?

The language of the bond is entirely clear, and if we are to apply to its interpretation the rules established by the Civil Code of Porto Rico, there can be no doubt as to the result.

When the defendant-in-error signed the bond, it guaranteed, broadly speaking, two things: first, that the Vandegrift Construction Company or its successors should complete certain work within a certain period; and second, that certain possible damages, if they arose, should be paid.

For the present, we shall ignore this second guaranty, which is not immediately pertinent to the discussion, and shall address ourselves to the first. Taking the actual language of the bond, the following were the things which the defendant-in-error guaranteed should be done:

(1) "The said principal shall within three years from the date of the acceptance by it of said Ordinance fully complete the work therein authorized in accordance with the conditions therein contained and in accordance with the plans and specifications therefor approved as therein provided."

(2) "Within the said period of three years from the date of the acceptance by it of the said Ordinance (said principal) shall build, complete and have in operation the entire line of railway authorized therein for (from?) such terminal in the Municipality of San Juan as may be determined by the said Executive Council, to its terminal on the Playa of Ponce on a route from Ponce to be determined by the said Executive Council in accordance with the plans and specifications therefor approved as in said Ordinance provided."

(3) "Within the said period of three years from the date of the acceptance by it of the said Ordinance (said principal) shall also complete and have in operation the entire power plant and transmission lines necessary for operating the said entire line of railway

in accordance with the conditions therein contained and in accordance with the plans and specifications therefore approved as therein provided."

(4) (Said principal) "shall duly perform within the said period of three years all other terms and conditions in said Ordinance required to be performed by the principal within the said period."

These four guaranties may be briefly summarized as follows:

(1) The work authorized by the Ordinance was to be completed *within three years*.

(2) The entire line of railway was to be completed and in operation *within three years*.

(3) The necessary power plant and transmission lines were to be completed and in operation *within three years*.

(4) The Construction Company, *also within the same period of three years*, was to perform all other terms and conditions which, according to said Ordinance were required to be performed by that Company "*within said period*, that is to say *within said period of three years*."

This last obligation is of special importance because of its general character, and because, only upon a wrongful interpretation of its terms, can any possible liability of the defendant-in-error arise. The original Ordinance of March 2, 1903, imposed upon the Vandegrift Construction Company a large number of obligations. According to that Ordinance, the Vandegrift Company undertook to do certain things and not to do certain others. For some of the things which it was to do, a period of three years was allowed; for others, lesser periods varying from three months to two years; others of its obligations were perpetual. The pertinent question here is: Did the defendant-in-error guarantee the doing or the not doing of anything not expressly mentioned in the bond? In other

words, can the fourth clause above quoted be interpreted in the sense that the defendant-in-error guaranteed the performance of those things which the Construction Company was to do *within periods other than the period of three years expressly mentioned in said bond*? Certainly the rules of interpretation laid down above are against any such strained construction. A brief comparison between the provisions of the original Ordinance and the provisions of the bond should also convince the Court that the bond was not intended to cover any other obligations of the Vandegrift Construction Company than those expressly mentioned in the bond itself.

The importance of this inquiry lies in the fact that the Vandegrift Construction Company forfeited its franchises because of its failure to do certain work which it had agreed to complete within a period less than the period of three years mentioned in the bond. The defendant-in-error is sought to be made liable, not because the Construction Company failed to do that particular work within three years, but because it failed to do it *within the lesser period* which, though mentioned in the Ordinance, is not mentioned in the bond.

In addition to the four things mentioned in the bond which the Vandegrift Construction Company was required to do *within a period of three years*, the Ordinance of March 2, 1903, imposed upon that Company the obligation to do certain other things which may be briefly summarized as follows:

- (1) The Company was to submit a survey of the route within three months after acceptance of the Ordinance. (Section 14, Record, page 24.)
- (2) The Company was to submit full plans before beginning construction. (Section 14, Record, page 24.)

(3) It was to complete the grading of the portion between San Juan and Caguas within one year. (Section 15, Record, page 24.)

(4) It was to complete the foundations and approaches of the Boqueron Bridge within one year. (Section 15, Record, page 24.)

(5) It was to complete, within two years, the portion between San Juan and Caguas and between Ponce and Jua Diaz. (Section 16, Record, page 24.)

(6) It was to complete, within one year, the power dam at Comerio Falls. (Section 18, Record, page 25.)

(7) It was to contract, within one year, for the "major part" of the electrical apparatus required for transformation of power into electric energy. (Section 18, Record, page 25.)

(8) It was to pay certain royalties upon certain gross receipts. (Section 23, Record, page 29.)

(9) It was to publish schedules of transportation rates. (Section 24, Record, page 30.)

(10) It was to transport certain persons free of charge. (Sections 27 and 28, Record, pages 31 and 32.)

(11) The railway, once built and in operation, was to be continued in operation; and the failure of the Company to do this at any time was to be followed by a forfeiture of the franchises. (Sections 16 and 17, Record, pages 24 and 25.)

In entire disregard of the express provisions of Article 1728 of the Civil Code of Porto Rico above quoted—which requires that no guaranty shall be presumed but that it shall always be clearly expressed—it is now sought to make the defendant-in-error responsible *for the failure of*

the Construction Company to do ONE of the above things (number 3) although it is not mentioned in the bond in any way. The Construction Company failed to complete the grading of the portion between San Juan and Caguas within one year or within one year, eight months and six days, according to extension granted. For this particular default its franchises were forfeited, and the defendant-in-error is here sought to be made liable, notwithstanding that it never guaranteed the performance of that particular stipulation.

If the bond can be extended to cover this breach, will not the same logic make it cover all eleven of the obligations above enumerated?

Upon the theory maintained by the Plaintiff-in-error, the defendant-in-error would have had to pay \$100,000 in case the Construction Company had failed to submit a survey of the route within three months or in case it had failed to present construction plans; or in case it had neglected to buy within one year a certain part of the electrical apparatus; or in case, having completed and put its line in operation, it had thereafter neglected or refused to pay certain royalties, or to publish certain schedules, or to transport certain persons. To state the proposition is to prove its absurdity.

The demonstration might easily be carried further by enumerating the things which the original Ordinance *prohibited* the Construction Company from doing, as for instance:

(1) The Company was authorized to erect and maintain telegraph and telephone lines for its exclusive use; but it was forbidden to permit the use of these by any one else. Its failure to observe this prohibition was to be punished by a fine of \$100 for each breach. (Sections 13 and 29, Record, pages 23-4 and 32.)

(2) The Company was also forbidden to accept passengers or freight between certain specified points; and a breach of that prohibition was also to be punished by a fine of \$100 for each breach. (Section 3, Record, page 19.)

Can it be supposed that when the defendant-in-error executed and delivered the bond in question, it had any thought of making itself liable for any such breaches by the Construction Company? And yet, if the bond is to be construed as including *any* of the provisions of the Ordinance *other than those expressly mentioned*, it follows that it includes *all* such provisions and not merely the one which required a certain amount of work to be done within one year.

Enough has probably been said to show that the bond, whether literally construed, as required by the laws of Porto Rico, or liberally construed, in direct contravention of those laws, could not possibly have been intended to cover anything more than the four items specifically mentioned in the bond itself, each of which refers to work for the completion of which *a period of three years* was stipulated.

As throwing further light upon this subject, if any were required, we call attention to Section 34 of the Ordinance; this provides that the bond shall be conditioned, not upon compliance by the Construction Company with the numerous and complicated stipulations of the Ordinance, but only and exclusively "*upon the full completion of the work herein authorized within three years* after such acceptance and in accordance with the provisions therein contained and in accordance with the plans and specifications therefor approved as herein provided."

Language could not well be clearer; and the bond which was given in compliance with said provisions was limited expressly as provided in Section 34, from which the above quotation has been taken.

THIRD.—Were the Obligations of the Defendant-in-Error Subsequently Modified or Cancelled?

The default which resulted in the forfeiture of the franchises was not a default under the original Ordinance of March 2, 1903, but a default under an amendatory Ordinance issued by the People of Porto Rico, through its Executive Council, without the knowledge or consent of the defendant-in-error. Whether or not that amendatory Ordinance was accepted by the Vandegrift Construction Company is at this moment immaterial. The question is: Could the Company and the Authorities of Porto Rico, without the knowledge or consent of the Surety Company, amend the original Ordinance, and at the same time keep alive the liability of the Surety Company?

What do the laws of Porto Rico provide with reference to modifications of contracts?

On this subject we quote the following Articles from the Civil Code:

“Art. 1124.—Las obligaciones se extinguen:

* * * * *

Por la novacion.”

“Art. 1171.—Las obligaciones pueden modificarse:

1º. Variando su objeto o sus condiciones principales.”

“Art. 1110.—La novacion, compensacion, confusion o remision de la deuda, hechas por cualquiera de los acreedores solidarios o con cualquiera de los deudores de la misma clase, extinguen la obligacion sin perjuicio de lo dispuesto en el Artículo 1113.”

“Art. 1748.—La obligacion del fiador se extingue al mismo tiempo que la del deudor y por las mismas causas que las demas obligaciones.”

“Art. 1752.—La prorroga concedida al deudor por el acreedor sin el consentimiento del fiador extingue la fianza.”

"Art. 1753.—Los fiadores, aunque sean solidarios, quedan libres de su obligacion siempre que por algun hecho del acreedor no puedan quedar subrogados en los derechos, hipotecas y privilegios del mismo."

(Translation.)

"Art. 1124.—Obligations are cancelled:

* * * *

By novation."

"Art. 1171.—Obligations may be modified:

1. By changing their object or their principal conditions."

"Art. 1110.—The novation, compensation, confusion or release of a debt, made by any joint creditor or with any of the debtors of the same class, cancels the obligation, without prejudice to the provisions of Article 1113."

"Art. 1748.—The obligation of a guarantor is cancelled at the same time as that of the debtor and for the same causes as are all other obligations."

"Art. 1752.—An extension granted to the debtor by the creditor without the consent of the guarantor releases the guarantor."

"Art. 1753.—Guarantors, even when joint, are released from their obligation whenever by act of the creditor, they cannot be subrogated to such creditor's rights, mortgages and privileges."

In the case of *Herva vs. Martinez*, decided by the Supreme Court of Spain on December 29, 1885 ("Jurisdiction Civil," Vol. LVIII, p. 1035), it was held that, when the payment of a promissory note had been guaranteed, the extension of the note without the consent of the surety discharged the latter. This decision was not based upon Article 1752 above. Said Article 1752 is a copy of Article 851 of the Spanish Civil Code, which said Article was not enacted until May 1, 1889, more than three years after the decision referred to. The Court took the broad ground that such extension released the surety, and based its de-

cision upon the general principle that the surety had not consented to the modification and that he could not be bound by anything which he had not expressly accepted.

All the above Articles, as well as the decision referred to, are based upon the principle recognized by all civilized countries that a man is bound only by that to which he agrees. If the contract be changed without his consent he is released from liability thereunder. Especially is this true in case of guaranty. In this class of contracts the guarantor assumes very specific and limited obligations. No material change can be made without discharging him, unless he has expressly consented.

Even an *extension* of time operates to discharge the guarantor unless, as in the present case, it has been expressly provided for. That such an Article as number 1752, above quoted, should be found in the Civil Code of Porto Rico proves how zealously the laws of that Island protect the interest of guarantors. Though that Article may, for special reasons, have no applicability to the present case, it nevertheless serves to illustrate the spirit of Porto Rican laws in this connection.

The law on this subject would seem to be perfectly clear. The only question is one of fact; did the amendatory Ordinance of July 7, 1904, materially change the original Ordinance of March 2, 1903? That it did, has been demonstrated in the earlier part of this brief. It may not be amiss, however, to briefly summarize the changes which were introduced, all of them without either knowledge or consent on the part of the defendant-in-error.

Under the original Ordinance, the Construction Company had unlimited freedom to employ on the work as many men as it pleased. Whether it employed few or many was a matter of entire indifference to the defendant-in-error, so long as the work referred to in the bond was completed within three years. The amendatory Ordinance

took away this freedom and imposed upon the Construction Company the obligation to never employ less than 250 men and never more than 500.

Would the Surety Company have executed the bond, if it had for a moment supposed that the failure to have 250 men employed on the work on any given day might, upon the theory of the plaintiff-in-error, render it (the Surety Company) liable for \$100,000? Is it conceivable that the bond would have been given if the Surety Company had foreseen that the Construction Company would not be permitted to employ more than 500 men, even though 1,000 or 10,000 might be required to complete the work in time?

Such limitations upon the freedom of the Construction Company unquestionably constituted a serious modification of the original contract, and might very well have led to forfeitures which were not contemplated at the time that the original Ordinance was issued, or when the bond was executed.

Again, upon what theory could the Surety Company have been made liable for \$100,000 if in any one week the Construction Company had failed to pay its employees? And yet, in such case, if the theory of the plaintiff-in-error be carried to its logical conclusion, this would inevitably have followed. If the Surety Company is to be made liable for *any* stipulation contained in the original or in the amendatory Ordinance, *but not mentioned in the bond itself*, that liability must extend to every other stipulation; and hence to this, which required the Construction Company to pay its employees weekly.

Again, and most important of all, what right had the People of Porto Rico and the Construction Company to cut down to one year, eight months and six days the period of three years originally stipulated in the bond? When did the Surety Company guarantee that the entire work or any

part of it should be completed in any period less than three years? Unless it can be shown that it did this, the People of Porto Rico have no standing in Court, for the whole theory of their case is that the defendant in error is liable for the failure of the Vandegrift Company to complete part of its work in a period less than the three years expressly mentioned in the bond.

The effect of Section 30 of the original Ordinance, authorizing certain changes to be made, has already been dealt with. What has been said on this point in the earlier part of this brief is applicable here. If this clause could have been availed of to modify in any and every way the obligations of the Surety Company under its bond, why was it found necessary to add to that bond a special and express authority for an extension of time? If it was thought necessary to include in the bond express authority to *extend* the period, how can it be supposed that no express authority was required to *abbreviate* that same period? Was authority necessary for the lesser thing and not for the greater? Was authority essential in order to keep the Ordinance alive, and was no authority required to kill it? To ask these questions is to answer them.

We further cite the case of *Pecksley v. Hozey*, 2 Rob. (La.) 479 (1842), also reported in 38 Am. Dec. at p. 222. The suit was against the sureties on the official bond of the Sheriff of the Parish of Orleans. At the time of giving the bond, he had the duty of serving all process in criminal as well as in civil cases, and "he was entitled to all the emoluments and perquisites of that office." Later an act of the Legislature of the State of Louisiana created a new office, "the sheriff of the criminal court of New Orleans," and such officer was appointed, his duty being to serve all process in criminal cases; and the act gave to him all the emoluments of the office, which had heretofore been received for the service of criminal process by the first officer,

for whom the defendant here had gone surety. The Supreme Court of Louisiana held that this discharged the surety on the bond of the first officer, and gave judgment for the defendant. In arriving at this result, no reference is made to the Louisiana Code. (That code, however, is similar to the Code of Porto Rico in all its essential points on the subject of sureties and the discharge of sureties.) The court decided the case on general principles. It first quotes a long extract from the *United States v. Tillotson*, Paine's Rep. 305, which case had discharged the surety on a builder's contract because "a slight modification had been made between the government and the principal contractor, by which the latter was permitted to use tapia instead of brick masonry on a part of the works, at one dollar less per cubic yard than had been agreed on for brick masonry." The Louisiana Court, in speaking of that case, says:

"In this case the alteration was apparently advantageous to the surety, but the court held that it could not be taken into consideration whether it was advantageous or prejudicial; that this was a matter upon which the sureties had a right to judge for themselves; and that it was not in the power of the plaintiffs to transfer the suretyship from one contract to another."

In adopting this case as an authority for its decision, the Louisiana Court states the common law rule in its strictest form. The court then quotes an English case which, it says, "illustrates the principle that the parties cannot modify their agreements without the consent of the surety, without discharging the latter." The court also quotes from *Miller v. Stewart*, 9 Wheat, 680, in which case the bond of a tax collector, who had been appointed for eight townships, was held to be released because his appointment was later extended to another township. The

court also quotes from Judge Story, in delivering the opinion in that case, as follows:

"To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound and no farther. It is not sufficient that he may sustain no injury by the change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract."

Finally, referring to the case before it, the Louisiana court says:

"He (the sheriff of the parish of Orleans) was entitled to certain extra allowances for his services in criminal cases. It must be considered that what might be the probable emolument of the office, such as it then existed, and how far they might safely guarantee his good conduct in the discharge of his duties, entered into the contemplation of the sureties. The act of the 18th of March, 1840, creating the office of sheriff of the criminal court and depriving Hozey of all its emoluments as well as patronage, left the office of sheriff of the parish of Orleans materially different from what it was when the bond was given. * * * This act produced a change in the condition of things which could not have been anticipated. The defendants consented to become the sureties of Hozey in his original office, with all its powers, patronage, and emoluments; but *non constat* that they would have consented to become so merely in his capacity of sheriff of the courts of civil jurisdiction. The name remained, but the substance was gone; and the suretyship of the defendants can not be moulded without their consent, so as to apply to this altered condition of things. * * * The sureties are authorized to look to the circumstances and the condition of things, as they existed at the time they signed the bond; and if the condition of things had been changed, and the office no longer existed such as it was, they had a right to consider themselves as no longer bound."

This case is all important in the present controversy. It was the decision of the Supreme Court of the State of Louisiana, which is under a code whose provisions as to novation are as strict in every particular as the Code of Porto Rico. In order that this may appear, we quote from the Revised Code of Louisiana Articles 2185 to 2190 inclusive:

"Art. 2185. (2181.)—Novation is a contract, consisting of two stipulations; one to extinguish an existing obligation, the other to substitute a new one in its place.

"Art. 2186. (2182.)—To constitute a novation, there must be, at the time it is made, a valid obligation on which it can operate; if the first obligation, which it is intended to replace by the new one, be void, or if there be no such obligation, then the new obligation is of no effect.

"Art. 2187. (2183.)—The pre-existent obligation must be extinguished, otherwise there is no novation; if it be only modified in some parts, and any stipulation of the original obligation be suffered to remain, it is no novation.

"Art. 2188. (2184.)—All kinds of legal obligations are subject to novation.

"Art. 2189. (2185.)—Novation takes place in three ways:

1. When the debtor contracts a new debt to his creditor, which new debt is substituted to the old one, which is extinguished.

2. When a new debtor is substituted to the old one, who is discharged by the creditor.

3. When by the effect of a new engagement, a new creditor is substituted to the old one, with regard to whom the debtor is discharged.

"Art. 2190. (2186.)—Novation can be made only by persons capable of contracting; it is not presumed;

the intention to make it must clearly result from the terms of the agreement, or by a full discharge of the original debt."

The above case of *Pecksley v. Hozey* shows that if a contract is with a government, a legislative act of the government can so vary the contract as to discharge the surety, and for the government to curtail the privileges which were granted to the principal when the surety signed, releases the surety.

See also *Orleans & J. Ry. vs. International Construction Company*, 113 La. Rep. 409, where it is held that, "the surety is released by any change in the principal contract without his consent."

The court states the case as follows:

"This is a suit against the International Construction Company * * * in damages for the default of said company in its contract to build a railroad for plaintiff; also against the National Surety Company, surety on the bond of the Construction Company, for the faithful performance of the work. * * * The contract contained a stipulation to the effect that certain bonds were to be deposited with a trust company to be disposed of for the raising of money, and, without the consent of the surety company, this arrangement was afterwards changed to another scheme, under one of the stipulations of which a part of the bonds originally agreed to be delivered to the trust company was to be withheld. It may well be that the latter scheme was a better one for the procuring of funds (although as a matter of fact, it proved unsuccessful); nevertheless it was a change in the contract. It was to that extent an abandonment of the contract upon which the surety company stood security, and the substitution of a new contract. Among the effects it had, it deprived the surety company to that extent of the benefit of that stipulation of the bond by which, in case of a breach of the contract, the surety company was to be subrogated to all rights of the contractor

under the original contract. There was also an important change in the contract with reference to the work. *It is common learning that the contract cannot be changed without the consent of the surety."*

VI.

Discussion of assignments of error as to rejections of testimony and offers.

The third specification of error is the refusal of the learned trial judge to admit in evidence a certain document offered by the plaintiff purporting to be an assignment from the Vandegrift Construction Company to the Porto Rico Railway, Light and Power Company, bearing date October 8, 1904, and purporting to assign to the last named company all the privileges, franchises, rights, grants and concessions given and granted to the Vandegrift Construction Company by the Executive Council of Porto Rico by the amending ordinance of July 7, 1904. It is to be observed that this instrument is not executed under the corporate seal of the Vandegrift Construction Company, although it appears by the testimony that the company had adopted and used a corporate seal in the transaction of its corporate business. The only authentication of this document offered to be shown was therefore the signature of J. A. Vandegrift, the president of the company, and no authority whatsoever was shown to have been conferred upon the president to execute this document, or any other document whatsoever on behalf of the Vandegrift Construction Company. It is hardly necessary to cite authorities to this court to show that where a deed, contract, conveyance or other instrument of writing purporting to be a contract of a corporation is offered in evidence,

it is necessary to show that the execution of such instrument of writing was authorized by the corporation itself, and particularly is this the case where a corporation has adopted a corporate seal and such corporate seal is absent from the instrument so offered in evidence. Written contracts of corporations are executed under their corporate seals, and while a contract of a corporation not under its corporate seal is not necessarily void, yet in the absence of the corporate seal, proof is required that the persons executing the contract had authority so to do.

To allow an officer of a corporation to prove by his own evidence in parol his authority to execute a written instrument on behalf of a corporation would be a most dangerous precedent and place all corporations at the mercy of those who had ever held any executive office in such corporation and entirely contrary to the law and practice of receiving proof of corporation instruments.

The fourth specification of error complains because W. F. Willoughby, a witness called on behalf of the plaintiff, was not permitted to testify to certain facts tending to show an implied acceptance on the part of the Porto Rico Railway, Light & Power Company of the terms of the so-called amending ordinance. If the court was right in rejecting the assignment of the so-called amending ordinance, then it naturally follows that the court was also right in rejecting the indefinite offer made by counsel for the plaintiff on the trial in the court below of "certain facts tending to show an implied acceptance" of the said amending ordinance. Before this implied acceptance could become at all material in the trial of this case it was necessary for the plaintiff to show that the Porto Rico Railway Light & Power Company had some interest in the so-called amending ordinance, and as the plaintiff was unable to show any such interest it followed as a matter of course that it was entirely immaterial whether there were any certain or

uncertain facts whatsoever tending to show an implied acceptance on its part of said amending ordinance.

The fifth specification of error complains that the plaintiff's witness, John S. Elliot, was not permitted to show the particulars concerning the number of insular police force of Porto Rico, where the prisons were located in Porto Rico with reference to the line of the proposed railway and where the courts were held. There was no objection made by the defendant upon the trial to this testimony if it was for the purpose of showing the actual damages which the People of Porto Rico sustained by reason of any alleged breach of the bond. But counsel for the plaintiff distinctly negatived this purpose and disclaimed his intention of proving the actual damages which the People of Porto Rico sustain, and merely desired to introduce the testimony for the purpose of showing that the People of Porto Rico had some reciprocal rights in the franchise or concession, which rights were alleged to have been interfered with by reason of what the plaintiff claimed to have been a breach in the concession, and in the bond. If it was not for the purpose of proving actual damages, what possible materiality could there have been in proving the number of men who constituted the insular police force of Porto Rico, or the number of miles which these policemen had to travel in order to reach the prisons and the courts. An inspection of the concession itself shows the rights and privileges reserved by the People of Porto Rico in this regard, and no parol evidence concerning the number of men who made up the police force and the number of miles they were required to travel, was in any way material for the purpose which the plaintiff set up at the trial.

Sixth specification of error. The testimony excluded and which forms the subject of this specification was also clearly immaterial. Whether the Vandegrift Construction

Company deposited the sum of ten thousand dollars (\$10,000) or any other sum with the People of Porto Rico, and whether in case such deposit was made the People of Porto Rico ever returned it to the Vandegrift Construction Company, were matters which were wholly foreign to the issue in this case. If it was necessary for the plaintiff at the trial below to prove that any sum deposited was returned to the Vandegrift Construction Company, it was certainly necessary first to prove that such sum had been deposited by the Vandegrift Construction Company; and there is an utter absence of proof of such fact. But even if such fact of deposit had been proved, we claim that the issue in this case raises no question in regard to its return or its non-return.

VII.

It makes no difference whether any or all of these items of evidence referred to in our last heading were admitted or excluded.

Supposing all the testimony covered by these four assignments of error had been admitted, it would still remain that the amount of the bond in suit was a penalty and not liquidated damages, that the terms of the contract had been changed by the authorities of Porto Rico without the knowledge or consent of the surety, and the legal effect of this action under the law of Porto Rico as well as the law of the United States was to discharge the surety from any obligation of the bond. No matter therefore whether the trial Judge erred or not as to these matters.

VIII.

It is respectfully submitted the judgment of the Circuit Court of Appeals must be affirmed.

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